4110. b 18.

THE LAW OF TITHES.

By T. H. SHAW, Gent.

Miſera ſervitus eſt ubi jus eſt vagum aut incognitum.

INSTITUTES.

Si eſſet iſta cognitio juris magna, ac difficilis, tamen utilitatis magnitudo deberet homines ad ſuſcipiendum diſcendi laborem impellere.

CIC.

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PREFACE.

THE Laws eſtabliſhed for the regulation of Tithes, are ſo extenſive in their operation, as to intereſt every one either in the receipt or payment of them. The ſcarcity of every book treating on the ſubject, induced the Author to publiſh this Work, the utility of which, he flatters himſelf will not be *confined to his own profeſſion*. To the candour of a liberal profeſſion, and the judgment of a diſcerning public, theſe ſheets are reſpectfully ſubmitted, well convinced, unleſs the authority of *Periander* is of no weight, when he ſays

Μελέτᾳ τὸ πᾶν

that he muſt in ſome degree meet with their approbation.



CHAPTER FIRST.

TITHES.

Of the Original of Tithes, and when firſt Eſtabliſhed in England; a Deſcription of Tithes, Parſonages, Vicarages, Impropriations, Glebe Lands, Oblations, Appropriations, Obventions, &c. and of the ſeveral Natures, Kinds, Qualities, and Incidents of Tithes in general.

THE time when Tithes were firſt introduced into this country cannot preciſely be aſcertained; it is ſaid by ſeveral authors that they were contemporary with the planting of Chriſtianity among the *Saxons*, by *Auguſtin*, the Monk, about the end of the ſixth century. But the firſt mention of them, in any written *Engliſh* law, is in a conſtitutional decree made in a Synod, held A. D. 786, wherein the payment of Tithes, in general, is ſtrongly enjoined. This Canon or Decree, which at firſt bound not the Laity, was effectually confirmed by two kingdoms of Seld. c. 8. ſ. 2.

the Heptarchy, in their Parliamentary Convention of Eſtates: conſiſting of the Kings of *Mercia* and *Northumberland*, the Biſhops, Dukes, Senators, and People. Which was a few years later than the time when *Charlemagne* eſtabliſhed the payment of them in *France*, and made that famous diviſion of them into four parts: one to maintain the Edifice of the Church, the ſecond the ſupport of the Poor, the third the Biſhop, and the fourth the Parochial Clergy.

A. D. 778.

Seld. c. 6. f. 7.

Sp. laws, b. 31, c. 12.

The next authentic mention of them is in the *fædus Edwardi et Guthruni*; or the laws agreed on between King *Guthrun*, the *Dane*, and *Alfred*, his ſon, *Edward* the elder, ſucceſſive kings of *England*, about the year 900. This was a kind of treaty between thoſe monarchs which may be found at large in the *Anglo Saxon* laws; wherein it was neceſſary, as *Guthrun* was a Pagan, to provide for the ſubſiſtence of the Chriſtian Clergy under his dominion; and accordingly, we find the payment of Tithes not only enjoined, but a penalty added upon non-obſervance, which law is ſeconded by the laws of *Athelſtan*, about the year 930.

Wilk. p. 51.

That there were infeudations of Tithes before the Parochial Rights were ſettled, is,

is, without diſpute, here in *England*, and in other Chriſtian kingdoms and commonwealths; in which particular the curious may receive abundant ſatisfaction from the learned labours of *Hoſpinian*, *Grotius*, *Spleman*, *Ridley*, &c. and that incomparable treatiſe of Mr. *Selden*, written on this ſubject. And it is more clear that before the time that the parochial right of tithes were ſettled, that the owners of lands might grant their Tithes to eccleſiaſtical or religious perſons; ſo that by this means the whole tithes of ſome pariſhes, and divers great portions out of other pariſhes were granted to Abbots, Priors, &c. and ſome to the parſons and rectors of other pariſhes; which is the reaſon why at this day there are ſeveral portions of Tithes, held from the pariſh churches by impropriators and rector of other pariſhes. Dugdale Monaſ. Anglicanum. Deg. p. 2. c. 2.

When the parochial right of Tithes was firſt ſettled, there hath been (as it ſhould ſeem) a vulgar error; for it is frequently ſaid in our common law books, that before the general council of *Lateran*, which was held A.D. 1179, that every one was at liberty to give his Tithes to what ſpiritual, eccleſiaſtical, or religious perſon he pleaſed; but, that by that council the parochial right of them was ſettled. Deg. p. 2. c. 2.

But there is no canon in that council to be found, whereby the parochial right of Tithes was ſettled, nor was the parochial right of Tythe ſettled till the year 1200, and then not by any canon, but by a decretal epiſtle of *Pope Innocent* the Third, ſent to the Archbiſhop of *Canterbury*, and dated from the Palace of *Lateran:* which has occaſioned Sir *Henry Hobart*, and others, to miſtake it for a decree of the council of *Lateran*, held A. D. 1179, which only prohibited the infeudation of Tithes, or their being granted to mere laymen. Whereas this letter of *Pope Innocent* to the Archbiſhop enjoined the payment of Tithes to the parſons of the reſpective pariſhes where every man inhabited, agreeable to what was afterwards directed by the ſame Pope in other countries. This epiſtle, ſays Sir *Edward Coke*, bound not the lay-ſubjects of this realm; but, being reaſonable and juſt (and he might have added, being correſpondent to the ancient law) it was allowed of, and ſo became *Lex Terræ*.

2 Inſt. 641.

This put an effectual ſtop to all the arbitrary conſecrations of Tithes; except ſome footſteps which ſtill continue in thoſe portions of Tithes, which the parſon of one pariſh hath a right to claim in another; for it is now univerſally held, that Tithes are due

of

of common right, to the parſon of the pariſh, unleſs there be a ſpecial exemption.

Tithes extra-parochial, or within the compaſs of no pariſh, belong to the Crown. By the canon law they were to be diſpoſed of at the diſcretion of the Biſhop; but by the law of *England* all extra-parochial Tithes, as in ſeveral foreſts, do belong to the King, and may be granted to whom he will. And accordingly they have been actually adjudged to him, not only by ſeveral reſolutions at law, but alſo in Parliament, in the caſe of the Prior and Biſhop of *Carliſle*, in the 18th *Edward* I. concerning Tithes in *Inglewood* foreſt, to wit, that the King, in his foreſt, may build towns, aſſart lands (or make them fit for tillage) and confer thoſe churches, with the Tithes thereof, at his pleaſure, upon whomſoever he pleaſeth; becauſe that the ſame foreſt is not within the limits of any pariſh. 2 Inſt. 647

A parſon *perſona eccleſiæ* is one that hath full poſſeſſion of all the rights of a parochial church. He is called parſon, *perſona*, becauſe by his perſon the church, which is an inviſible body, is repreſented; and he is in himſelf a body corporate, in order to protect and defend the rights of

the church (which he perſonates) by a perpetual ſucceſſion. And ſuch a one is called *perſona imperſonata*; that is, a rector or patron in full poſſeſſion of a church parochial, whether the ſame be preſentative or appropriate, and the Tithes and revenues of ſuch a church is commonly called a parſonage. But the appellation of parſon, Sir *Edward Coke* obſerves, however it may be depreciated by familar, clowniſh, and indiſcriminate uſe, is the moſt legal, moſt beneficial, and moſt honourable title that a pariſh prieſt can enjoy; becauſe ſuch a one, and he only, is ſaid *vicem ſeu perſonam eccleſiæ gerere.*

A vicar is one that has a ſpiritual promotion or living under the parſon, and is ſo denominated *quaſi vice agens parſonæ*; and ſuch a promotion or living is called a vicarage, which is a part or portion of the parſonage allotted to the vicar for his maintenance and ſupport.

This part or portion is in ſome places an annual ſum of money certain, but in moſt places it is a part of the Tithes in kind, which moſt commonly is the ſmall Tithes; and in ſome places he has a part of the great Tithes, and alſo of the glebe, and ſuch a one is called a vicar endowed.

An

An advowſon (ſo called becauſe the right of preſenting to the church was firſt gained by ſuch as were founders, benefactors or maintainers of the church) is the right of preſentation to a church or eccleſiaſtical benefice. There are three kinds of advowſons, viz. preſentative, collative, or donative; when preſentative, the patron hath a right of preſentation of a clerk to the biſhop or ordinary, if canonically qualified; collative is, where the biſhop and patron are one and the ſame perſon; donative is, when the King, or any ſubject by his licence, doth found a church or chapel, and ordains that it ſhall be merely in the gift or diſpoſal of the patron, ſubject to his viſitation only, and not to that of the ordinary, and veſted abſolutely in the clerk by the patrons deed of donation, without preſentation, inſtitution, or induction. Theſe advowſons have all Tithes annexed to them, and are uſually paid to the officiating miniſters, which before were given to the clergy in common. Inſt. 119.

A parſon has during his life the freehold in himſelf of the parſonage-houſe, the glebe, the Tithes, and other dues. But theſe (as before obſerved) are ſomtimes appropriated; that is to ſay, the benefice is perpetually annexed to ſome ſpiritual corporation, either

ſole or aggregate, being the patron of the living; which the law eſteems equally capable of providing for the ſervice of the church, as any ſingle private clergyman. This contrivance ſeems to have ſprung from the policy of the monaſtic orders, who have never been deficient in ſubtile inventions for the increaſe of their own power and emoluments.

Tithes being (as before obſerved) diſtributed in a four-fold diviſion; one for the uſe of the biſhop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent (or parſon). When the ſees of the biſhops became otherwiſe amply endowed, they were prohibited from demanding their uſual ſhare of theſe Tithes, and the diviſion was in three parts only. And hence it was inferred by the monaſteries, that a ſmall part was ſufficient for the officiating prieſt; and that the remainder might well be applied to the uſe of their own fraternities (the endowment of which was conſtrued to be a work of the moſt exalted piety) ſubject to the burthen of repairing the church, and providing for its conſtant ſupply. And therefore they begged and bought, ſubject to maſſes and obits, and ſometimes even for money, all the

advowſons

advowſons within their reach, and then appropriated the benefices to the uſe of their own corporation.

But in order to compleat ſuch appropriation, the king's licence, and conſent of the biſhop muſt firſt be obtained; becauſe both the king and the biſhop may ſometime or other have an intereſt, by lapſe, in the preſentation to the benefice; which can never happen if it be appropriated to the uſe of a corporation, which never dies; and alſo becauſe the law repoſes a confidence in them, that they will not conſent to any thing to the prejudice of the church. The conſent of the patron is alſo neceſſarily implied, becauſe (as was before obſerved) the appropriation can be originally made to none; but to ſuch ſpiritual corporation, as is alſo the patron of the church; the whole being, indeed, nothing elſe but an allowance for the patrons to retain the Tithes and glebe in their own hands, without preſenting any clerk, they themſelves undertaking to provide for the ſervice of the church. Plowd. 496.

When the appropriation is thus made, Hob. 307. the appropriators and their ſucceſſors are perpetual parſons of the church; and muſt ſue and be ſued in all matters concerning the

the rights of the church, by the name of parſons.

This appropriation may be ſevered, and the church become diſappropriate two ways: as, firſt, if the patron or appropriator preſents a clerk, who is inſtituted and inducted to the parſonage; for the incumbent ſo inducted and inſtituted is, to all intents and purpoſes, a complete parſon; and the appropriation being once ſevered can never be re-united again, unleſs by a repetition of the ſame ſolemnities.

Co. Lit. 46.

And when the clerk ſo preſented is diſtinct from the vicar, the rectory thus veſted in him becomes what is called a ſinecure, becauſe he hath no cure of ſouls, having a vicar under him, to whom that cure is committed. Alſo, if the corporation which has the appropriation, is diſſolved, the parſonage becomes diſappropriate at common law; becauſe the perpetuity of perſon is gone which is neceſſary to ſupport the appropriation.

The parſon in ſome pariſhes is a clergyman, and ſometimes the miniſter or incumbent of the ſame church; but in other places he is a mere layman, and cannot ſupply

ſupply the church but by a ſpiritual vicar; and this ſo poſſeſſed by a layman is called an impropriation, and himſelf the impropriator.

By "The *Stat.* 9. *Ed.* 2. *ſt.* 1. that the "ability of a perſon preſented unto the "benefice of a church ſhall be examined "into by a ſpiritual judge." And when ſo preſented, the biſhop may refuſe him on many accounts. The moſt common and ordinary cauſe of refuſal is, want of learning.

But there are alſo many other cauſes for which a clerk preſented may be lawfully refuſed; as, if he be perjured before a lawful judge; or if he be an Heretic or Schiſmatic; or irreligious; or (as is ſaid in the old books) if he is a baſtard, and not diſpenſed withall; or if he is within age; or if he or his patron be excommunicated for the ſpace of forty days; or if he be outlawed, or guilty of forgery; or if he hath committed ſimony in the preſentation he brings, or of another preſentment to a former benefice; or hath committed manſlaughter, that is if he be attainted thereof, and not pardoned. And it is ſaid, that the ordinary may refuſe a clerk upon his own knowledge for an offence Watſ. c. 20.

fence committed by him, which is a good cauſe of refuſal, although he be not convicted thereof by the law; and this ſhall be tried by iſſue, whether it be true or not: and generally all ſuch as are ſufficient cauſes of deprivation, are alſo ſufficient cauſes of refuſal.

By *Stat.* 13. *Eliz. c.* 12, it was enacted, that no perſon under twenty-three years of age, and in deacons orders, ſhould be preſented to any benefice with cure; and if he were ordained prieſt within one year after his induction, he ſhould be *ipſo facto* deprived.

By *Stat.* 13 and 14 *Car.* 2. *c.* 4, no perſon is capable to be admitted to any benefice unleſs he hath firſt been ordained a prieſt.

Thus it appears that there are four requiſites to conſtitute a parſon or vicar: viz. holy orders, preſentation, inſtitution, and induction.

The fruits or profits of a parſonage or vicarage, beſides the Tithes, are glebe lands (where there are ſuch, for in ſome places there are none) oblations, obventions, and other

other perquiſites on marriages, baptiſms, &c. and in ſome places mortuaries.

The glebe is that portion of land, mea- Watſ. c. 17.
dow, or paſture that belongs to, and is parcel of the parſonage or vicarage over and above the Tithes; and ſuch glebe, while in the hands of the parſon, is not to pay Tithes to the vicar. But if the parſon lets his rectory, reſerving the glebe, he ſhall pay Tithe to his leſſee; and if he ſell the corn ſown on the glebe, the vendee ſhall pay Tithe; alſo glebe lands in another pariſh ſhall pay Tithe.

Oblations, obventions, and offerings ſeem in their proper nature to be one and the See infra, c. 5,
ſame thing; though obvention is the largeſt word. And under theſe are comprehended not only thoſe ſmall cuſtomary ſums commonly paid by every perſon when he receives the ſacrament of the Lord's ſupper at *Eaſter*, which in many places is by cuſtom from every communicant, and in *London* four-pence an houſe; but alſo the cuſtomary payment for marriages, chriſtenings, churchings, and burials.

Mortuary ſeems to have been originally
an oblation made at the time of a perſon's See infra,
death. In the *Saxon* times there was a fu- c. 5.
neral

neral duty to be paid, which was called *pecunia ſepulchralis*, and *ſymbolum animæ*, or the ſoul ſhot; which was required by the counſel of *Ænham*, and inforced by the laws of king *Canutus*, and was due to the church which the party deceaſed belonged to, whether he was buried there or not.

Dr. *Stillingfleet* makes a diſtinction between mortuaries and corſe preſents: The mortuary, he ſays, was a right ſettled on the church, upon the deceaſe of a member of it; and a corſe preſent was a voluntary oblation uſually made at funerals.

All Tithes according to a general diviſion are reducible to three kinds, *viz.* predial, perſonal, and mixt.

2 Inſt. 649. Predial Tithes are ſuch as ariſe merely and immediately from the ground, as grain of all ſorts, hay, wood, fruits, herbs, &c. for a piece of land or ground being called in Latin, *prædium*, (whether it be arable, meadow, or paſture) the fruit or produce thereof is called prædial, and conſequently the Tithe payable for ſuch annual produce, is called a prædial Tithe.

Perſonal Tithes are ſuch as ariſe and grow due by the profits that proceed from the

the honeſt labour and induſtry of mankind in ſome perſonal work, employment, artifice, or negociation; as buying, ſelling, merchandizing, or the manual labour, art, or occupation of carpenters, joiners, maſons, taylors, fiſhers, fowlers, hunters, or the like; and for this Tithe there is generally claimed the tenth part of the clear profits that they make by their reſpective trades, arts, or employments. Ibid.

Mixt Tithes are ſo called, for that they participate in their nature both of predial and perſonal qualities, *i. e.* ſuch as ariſe partly from the earth or land, where the thing or animal is produced, bred, or fed; and partly from the labour and care of man in their raiſing, breeding, or feeding; of which ſort are cattle, as colts, calves, lambs, chickens, milk, cheeſe, eggs, and the like. Ibid.

Tithes with regard to value are divided into great and ſmall. 2 Inſt. 649.

And in this diviſion corn, hay, and wood are all accounted great Tithes. Ibid. Deg. p. 2. c. 1.

Small Tithes; as the predial Tithes of other kinds, together with thoſe which are called mixt and perſonal. Gibs 663.

But

See infrà, c. 2.

But it is ſaid that this diviſion may be altered, firſt, by cuſtom which will make wood a ſmall Tithe in the endowment of a vicar, under the general words, *minutæ decimæ.*

Second, by quantity, which will turn a ſmall Tithe into great, if the pariſh is generally ſown with it.

Third, by change of place (according to the old books) which makes the ſame things, as hops in gardens, ſmall Tithes; in fields, great Tithes. But this ſeems to be contradicted in the following caſe: *Wharton* v. *Liſle*, where the Tithe of flax, though ſown in great fields, was adjudged to the vicar as a ſmall Tithe.

3 Lev. 365. Comb. 201, 209.

See in next chap.

Wallis v. *Pain*, and another. Clover although ſown in large fields, adjudged a ſmall Tithe; and Chief Baron *Comyns*, in delivering the opinion of the court, ſaid, "This ſeems the better opinion, for it "gives foundation for continual debate, "what ſhall be a quantity too large for "ſmall Tithes; if it be ſaid what grows in "a garden, ſome gardens are not half an "acre, others two or three acres; gardens "are now enlarged to fifty or one hundred "acres."

Smith

Smith v. *Wyat.* A bill was brought by the rector of a parish in Essex, for the Tithe of potatoes sown in great quantities in the common fields, which he therefore claimed as a great Tithe. But Lord *Hardwick* held that potatoes being in their nature a small Tithe, the sowing them in greater quantities could make no alteration. So it was holden in *Noah Webb's* case, 14 Car. 1 Rol. 643. S. 3. 2 Ath. 364. 4 Mod. 183 Carth. 263. Skin. 341.

And according to the above decision, &c. the law is now settled, namely, that the Tithes are to be denominated, great or small, according to the nature and quality thereof, and not according to the quantity. See infra.

Of common right Tithes are to be paid for such things only as do yield a yearly increase by the act of God, for the rule is, *ubi non est annua renovatio, ibi decimæ non debent solvi.* Watf. c. 46. 1 Roll. Abr. 641.

Yet this rule admits of some exceptions, as for instance, Tithe is due of saffron, though gathered but once in three years; and concerning *sylva cædua*, (or felled wood and preserved to grow again) there is an entry that consultations shall be granted thereof, notwithstanding that it is not renewed every year. Gibs. 665.

Gibſ. 669. Generally of things increaſing yearly, Tithes ſhall be paid only once in the year.

But this rule has likewiſe its exceptions, and it is evidently againſt the rules of the canon law, which requireth, that if ſeeds be ſown upon the ſame ground, and renew oftner than once in the year, the Tithes thereof ſhall be paid ſo often as they renew. And this ſeemeth ſtill to be the law; as in the caſe of clover, for inſtance, which reneweth oftner than once in the year, Tithes thereof ſhall be paid as often as it doth renew.

2 Mod. 77. Of common right, no Tithes to be paid of ſtone got out of quarries, nor for pit coals, turfs, ſlates, bricks, tiles, earthen pots, nor of any thing made of earth.

1 Mod. 35. Nor of marle, ſand, lime, chalk, or any thing uſed for the improvement of ground; for by theſe the earth, and conſequently the Tithes thereof, are bettered and improved.

Nor for any thing gotten out of the
1 Chan. Ca. 272. 282. ground, as tin, lead, copper, or other metal.
2 Vern. 46. Nor is Tithe ore due of common right, for that they are parcel of the freehold, and the parſon has Tithes of the graſs or corn which grows upon the ſurface of the land.

But

But by particular cuſtom, Tithes of any of theſe may be due and payable. 2 Inſt. 657.

By the common law of England, there is no Tithe due for things that are *feræ naturæ*.

Therefore it hath been reſolved, that no Tithe ſhall be paid for fiſh taken out of the ſea, or out of a river, unleſs by cuſtom; neither for the ſame reaſon is any Tithe due of deer, conies, or the like. But if the Tithe thereof be due by cuſtom, it muſt be paid. See infra.

As lands which are in no pariſh pay Tithes to the king; ſo lands lying within the precincts of a foreſt (though alſo in a pariſh), if they be in the hands of the king, do pay no Tithes. And this privilege extends to the king's leſſee, but not to his feoffee. But if the foreſt be diſafforeſted, and be within any pariſh, then they ought to pay Tithes in the hands of the king's leſſee. Gibſ. 680.

It hath been queſtioned, where a park hath paid a *modus*, and is diſparked, whether the *modus* ſhall continue, or be diſcharged, and Tithes paid in kind; and all the books are clear, that if the *modus* was a certain conſideration in money for all the Tithes of ſuch Gibſ. 684.

a park, ſuch *modus* ſhall hold, notwithſtanding it be diſparked; but if the *modus* was for the deer and herbage of ſuch a park, the *modus* is gone upon diſparking.

Glebe lands in the hands of the parſon ſhall not pay Tithe to the vicar, though endowed generally of the Tithe of all lands within the pariſh.

See c. 8: infra.

Another ſpecies of land exempted from the payment of Tithe, is the land which belonged to the monaſteries at the time of their diſſolution in the reign of Hen. VIII.

CHAP. II.

PREDIAL TITHES.

Their Nature, Kinds, and Incidents in particular; for what things Due of Common Right, &c. and in what Caſes not Due by Cuſtom or Preſcription, &c. and this with reſpect to the Tithes of Corn, Grain, Hay, Graſs, Wood, Trees, Fruits, Seeds, Honey, Wax, &c.; Hemp, Flax, Hops, Madder, &c.

HAVING in the preceding chapter treated of Tithes in general, and therein given a definition or deſcription of their ſeveral kinds: *viz.* predial, perſonal, and mixt; we ſhall now proceed to diſcourſe of each of theſe more particularly, and in this chapter ſhew the nature, kinds, and incidents of predial Tithes: for what things they are due or payable, and in what caſes they are not payable, and the reaſons thereof.

And firſt, as before is obſerved, Predial Tithes are ſuch as ariſe merely from the

fruit or produce of the earth, land, or ground only. For a piece of land or ground being called in Latin, *Prædium*, whether it be arable, meadow, or paſture, the fruit or produce thereof is called prædial, and conſequently the Tithe payable for ſuch produce is called a predial Tithe.

Predial Tithes are divided into two kinds.

Firſt, *Majores Decimæ*, or great Tithes, which are commonly called parſonage Tithes, for that they are properly due, and moſt uſually paid to the parſon (who is ſometimes the lay patron) or rector of the church.

Second, *Minores vel minutæ Decimæ*, or ſmall Tithes; and theſe are uſually called vicarage Tithes, as being properly due and payable to the vicar or curate, though ſometimes, as in a vicarage endowed, he has part of the great Tithes alſo.

The predial great Tithes are chiefly of corn or grain, ſown in fields open or incloſed, as wheat, barley, rye, oats, &c. And according to the following deciſions, ſo are beans and peaſe, when ſown in open fields.

My

My Lord Chief Baron *Comyns*, in delivering the opinion of the court in the caſe of *Wallis* v. *Pain*, ſaid, "That the diſtinction of quantity might be proper as to beans, peaſe, or other pulſe, becauſe they had exiſtence in former times, and appropriations were made, *de Bladis & Leguminibus*, to religious houſes; but as to things newly introduced into England, there is but little reaſon that the patentees, who claim only what came to the crown upon the diſſolution of monaſteries, ſhould have Tithe of thoſe things which were never appropriated, and to which the religious houſes diſſolved never had a title." Com. 633.

From the above opinion, and from the following deciſion, it ſeems that the rule of all Tithes, being great or ſmall, according to the nature or quality, and not according to the quantity, is by no means invariable.

Sims, vicar of *Eaſtham*, in *Eſſex*, againſt *Bennett* and *Johnſon*, occupiers of land within the ſaid pariſh, and *Wilkes* and *Hitch*, impropriators of the rectory of the ſaid pariſh, December 6, 1762. Mr. *Sims*, the vicar, brought his bill in Chancery in the year 1756, ſetting forth that by the 5 Bro. Par. ca. 586.

endowment of the vicarage, he is entitled to the Tithes of gardens and curtilages; and all ſorts of Tithes, except the Tithes of ſheaves, hay, and mills *(Præter decimas garbarum et fœni et molendinorum adventum)*; that the defendants, *Bennet* and *Johnſon*, holding ſeveral parcels of land in the ſaid pariſh, did in the ſame year cultivate ſeveral pieces of ſuch land with beans and peaſe, of ſuch ſort as are generally uſed for the food of man, which they gathered in the months of *June*, *July*, and *Auguſt*, by the hand in the field, by plucking them from the ſtalk whilſt green, and ſent the ſame to market, and ſold them for the food of man accordingly; and inſiſting, that by the gathering of beans and peaſe by the hand, ſo cultivated as aforeſaid, he, the ſaid *Sims*, as vicar, by virtue of the ſaid endowment, became entitled to the Tithe thereof, and that no Tithe ought to be paid for the ſame to the impropriator, nor ought beans and peaſe ſo cultivated and gathered by the hand, by plucking from the ſtalk whilſt green, to be conſidered as part of the Tithes appropriated to the rectory. To this bill the defendants put in their anſwers.

The defendant, *Bennet*, ſaid, that " in the year 1756 he ſowed 13 acres, or thereabouts

abouts, with peaſe and beans, in the open fields in the ſaid pariſh, and believed that in *June*, *July*, and *Auguſt*, in the ſame year, he gathered ten acres and a half, or thereabouts, of the ſame by the hand in the field, by plucking them from the ſtalk whilſt they were green, and ſold them in a cart retail, by pecks and ſmaller quantities, in and about the pariſh of *Eaſtham*, and in the ſtreets of *London*, and the remainder of ſuch peaſe and beans were gathered into the barn, and threſhed."

The defendant, *Johnſon*, ſaid, that " he ſowed five acres of beans and peaſe in like manner, and part thereof he plucked by the hand when green, and ſold the ſame in *London* ſtreets, and at market, and gathered and threſhed the remainder in the barn."

And both the ſaid defendants ſaid, that all their ground in the ſaid pariſh, ſowed with peaſe and beans in the ſaid year, was ploughed for that purpoſe, and no part thereof was dug with a ſpade, except under or near the hedges, where the ſame could not be ploughed, or in ſuch places as were too wet to be ploughed; and that the Tithe of all beans and peaſe, whether gathered green or otherwiſe, having been always

always paid to the rector, and eſteemed to belong to him, they had therefore compounded with the impropriators for the ſame, and hoped they ſhould not be compelled to account alſo with the vicar for the ſame Tithes.

The defendants, *Wilkes* and *Hitch*, in their anſwers, inſiſted on their right as impropriators.

Witneſſes were examined on both ſides.

Several of whom depoſed, that ſuch peaſe and beans as are uſed for the food of man, had been cultivated in the fields of the pariſh of *Eaſtham* only for about thirty years paſt, and were cultivated and gathered green off the ſtem, as uſually done in a garden (ſave only, that in the field the plough hath been generally uſed, and in the garden the ſpade) and in rows, but in a different manner from thoſe planted and ſowed in fields in the common courſe of huſbandry for provender, and not for man's food.

Mr. *Wyat*, one of the witneſſes, vicar of the pariſh of *Weſtham* (adjoining to that of *Eaſtham*) ſaid, that "in the year 1753 he

he commenced a ſuit in chancery againſt the impropriator, and others of his ſaid pariſh, for ſuch Tithes, and that the then Lord Chancellor decreed in his favour, and he hath enjoyed the ſaid Tithes ever ſince.

On hearing, the Lord Keeper *Henley* decreed, *Nov.* 10, 1760, that the vicar's bill ſhould be diſmiſſed without coſts.

Upon this Mr. *Sims* appealed to the Houſe of Lords, ſetting forth the following reaſons:

Firſt, It is admitted by the reſpondents, that if the Tithe of beans and peaſe, cultivated in a garden-like manner, and gathered by hand whilſt green, is a ſmall Tithe, the ſame is not included in the exception out of the vicar's endowment. Many arguments may be offered to prove it ſuch. The quality of all Tithes is to be determined at the time of ſeverance when the right accrues. The ſame thing which produces a great Tithe in one ſtate and mode of culture, produces a ſmall Tithe in another. If clover is cut for hay, it is conſidered as a great Tithe; when ſuffered to grow for ſeed, it is conſidered as a ſmall Tithe. This is alſo the caſe of tares; when

when cut green, they are referred to the claſs of ſmall Tithes; when matured and dried before cut, they are referred to the claſs of great Tithes. The ſythe in queſtion is certainly not a Tithe of corn or grain; and it bears two marks of a ſmall Tithe: the one, that it is in the nature of a garden Tithe, being diſtinguiſhed out of the deſcription, not by difference of culture, but merely by the locality of ſetting beans and peaſe in fields; the other, that it is a new and modern culture.

Second, ſuppoſing the Tithe in queſtion to be a great Tithe, ſtill the vicar was intended to be endowed with it, becauſe it is not included in the exception out of his endowment. Peaſe and beans plucked by the hand, whilſt green, from the ſtem, however cultivated, or wherever planted, can never be Tithed under the deſcription of *decimæ garbarum*. *Spelman*, in his gloſſary, interprets *garba* to be *faciculus* either of fruits or wood. *Du Freſne* calls it *ſpicarum manipulus*. And *Matthew*, of *Weſtminſter*, ſaith, *frumenti manipulus quem patriæ cinquæ dicimus*, ſheaf, *gallice*, *vero garbam*. But the Tithe in queſtion cannot fall under the meaning of the word *garba*, being ſet out and taken by a meaſure totally different.

Third,

Third, It doth not ſeem an objection of weight to the appellants demand, that if Tithes are paid to the vicar for peaſe and beans gathered green, another Tithe will be claimed by the rector, when the ſtalks ripen and are cut down, by which means a double Tithe is ſaid to be payable for the ſame thing. This will appear otherwiſe when the matter is conſidered not in the light of paying two Tithes for one thing, but of dividing the ſame Tithe between two different owners, according to the grant of appropriation. The vicar will have his Tithe of what is actually gathered green, and the rector of what is left after it ſhall be cut down.

Fourth, It is ſubmitted to be an objection of as little weight as the objection juſt anſwered: namely, that in conſequence of the appellant's reaſoning, the farmer will have it in his power to determine the property of Tithes between rector and vicar, from the manner or place, culture, or time of gathering, but this is a contingency which attends this ſort of right; the occupier being allowed by the law to cultivate his lands, as he and the landlord ſhall think proper; which makes Tithes, in their own nature, a fluctuating and uncertain inheritance.

On

On the other hand, the reſpondents hope the decree will be affirmed, for theſe (amongſt other) reaſons.

Firſt, becauſe a vicar cannot claim Tithes of any kind but by endowment, or by uſage (which is only evidence of an endowment). In this caſe, there is no evidence of uſage; and therefore if the vicar is not entitled to the Tithes in queſtion, under the endowment, he is not entitled at all.

Second, by the endowment the Tithes in queſtion are excepted out of the grant to the vicar; for the words *decimæ garbarum*, in the exception, have been always conſidered technical terms, appropriated to, and deſcriptive of great Tithes, and to diſtinguiſh them from ſmall Tithes. And *garba*, in its ſignification, comprehends peaſe and beans growing in fields, as well as all other ſorts of corn and grain growing in fields. So that peaſe and beans are in their own nature a great Tithe, and excepted out of the vicars endowment in this caſe under the name of *garbæ*.

Third, As to the objection, that in the preſent caſe, the peaſe and beans being plucked green, and ſold for the food of man

man, they are applied to the ſame uſe as beans and peaſe growing in gardens, which are a ſmall Tithe; and that this Tithe ought to take its denomination from the uſe the thing tithable is applied to, and therefore is a ſmall or vicarial Tithe, and not within the meaning of *decimæ garbarum*. It is anſwered that all the caſes relative to Tithes, taken together, ſerve to prove, that the law denominates and adjudges Tithes to be great or ſmall according to the nature of the thing, and not from the mode of cultivation, or uſe to which the thing is applied. And therefore in this caſe, the application of the peaſe and beans in queſtion for the food of man, they not being nor falling under the denomination of Tithes of gardens, technically called *decimæ hortorum*, ought not to convert the Tithes in queſtion into ſmall Tithes.

After a full hearing, December 6 and 7, 1762, the Lords affirmed the decree.

Alſo, the Tithe of graſs and hay is a great Tithe, and ſo is eſteemed the Tithe of underwood, and likewiſe the toppings and loppings of trees, if *Sylva cædua*. And the like of wood of apple-trees, and other fruit-trees, if cut in a year when no Tithe paid

paid of the fruit, is as other wood for firing, all great Tithes.

Clover, if cut for hay, is a great Tythe.

Trees when matured and dried before cut, are referred to the claſs of great Tithes.

The predial *minores vel minutæ decimæ*, or ſmall Tithes, are all kinds of fruits, roots, ſeeds, herbs, turnips, parſley, ſage, cabbage, ſaffron, woad, hops, hemp, flax, honey, wax, potatoes, although ſown in the open fields in large quantities, as in the caſe of *Smith* v. *Wyatt*:

2 Atk. 364.

The bill was brought by the rector of a pariſh in Eſſex for the Tithes of potatoes, ſown in great quantities in the open fields, and therefore claimed them as a great Tithe.

The defendant, the vicar, inſiſted, that notwithſtanding the potatoes were ſown in the open fields, they ſtill continue a ſmall Tithe, and the quantity makes no difference.

Per *Lord Chancellor*:—The queſtion is, Whether potatoes planted in fields are great or ſmall Tithes?

Potatoes

Potatoes in their nature are ſmall Tithes; then the queſtion will be,—Whether they receive any alteration of their right in cultivating them in greater or ſmaller quantities?

If this ſort of root ſhould be called ſmall Tithe when planted in gardens, and great when planted in fields, it would introduce the utmoſt confuſion, and muſt vary every year in every pariſh. Therefore I am warranted in my opinion, that the Tithe of potatoes is a ſmall Tithe; and his Lordſhip decreed accordingly.

Beans and peaſe, when ſown in a garden, are ſmall Tithes, though a plough be uſed inſtead of a ſpade, as in the caſes of *Stephens* and *Martin*, *H.* 7. *Wil.* 3.; *Nicholas* and *Elliot*, *H.* 10. *Ann.*; and *Auſtin* and *Nicholas*, *H.* 4. *Geo.* 1.

And the ſeed of clover is in its nature a ſmall Tithe, as in the caſe of *Wallis* v. *Pain* and *Underhill*. *H.* 1738. A bill was exhibited in the Exchequer by the plaintiff, *Wallis*, who was tenant or farmer under the impropriator of the great Tithes, in the pariſh of Prittlewell, in Kent, and inſiſted that the defendant ſowed a field with clover, which was cut for hay, and that he let the Com. 633.

aftermath grow for ſeed, which was cut and threſhed for ſeed, of which the plaintiff ought to have the Tithe as a great Tithe.

The defendant, *Pain*, inſiſted, that he had paid the plaintiff for the Tithe hay of his clover; and that the aftermath of clover ſtood for the ſeed, which was a ſmall Tithe, and payable to the vicar. And Mr. *Underhill*, the vicar, inſiſted on the Tithe of clover-ſeed as a vicarial or ſmall Tithe.

By the depoſitions of ſeveral witneſſes it appeared, that the difference between clover cut for hay and that cut for ſeed was conſiderable; when made into hay, it is cut whiſe the graſs is green, and fit for cattle to eat; and when cut for ſeed, it ſtands till the ſtalk is ſear and good for nothing, but is thrown out for ſtover or fodder, and the ſeed is the only thing of value or regarded.

It was argued for the plaintiff, that clover-ſeed is in the nature of it a great Tithe, and therefore due to the plaintiff; for as Tithe-hay is due to him, the ſeed of the hay muſt of conſequence belong to him alſo; that where the parſon is entitled to Tithe-hay, he will be entitled to the hay made of clover as well as of other graſs;

graſs; and if to the hay, likewiſe to the ſeed.

On the other ſide it was inſiſted, that clover-ſeed is in its nature a ſmall Tithe; that the Tithe of no ſeed was ever loooked on as a great Tithe; and as to what was ſaid that the ſtalk and ſeed ſhould go together, it is frequent that the ſeed or fruit of trees goes to the vicar, when the tree goes to the parſon; wood is always reckoned a great Tithe, and goes to the rector, unleſs the vicar be ſpecially endowed with it; but acorns, as well as the fruits of all other trees, were always holden as ſmall Tithes.

Lord Chief Baron *Comyns* delivered the reſolution of the Court as follows:

" That by the canon law, as long as the diſtinction hath been made between great and ſmall Tithes, which is as antient as appropriations to religious houſes, who uſually engroſſed the great Tithes, but left the ſmall Tithes to the curate, all ſeeds have been reckoned as ſmall Tithes. The common law ſeems to follow the canon law in this point. And all the reſolutions relating to Tithes, which proceed from things newly introduced into England, have holden

them to be ſmall Tithes; as to clover-ſeed, there doth not appear to have been any expreſs determination on this point. But it is a ſeed, and all ſeeds are mentioned as ſmall Tithes; and no inſtance appears that ever any ſeed was holden to be a great Tithe; it is a ſeed newly introduced, and therefore there is reaſon to look upon it to be of the nature of thoſe things of a new invention, which have been always holden as minute Tithes.

"It is true that clover-graſs made into hay is of the nature of all other graſs made into hay, and conſequently muſt belong to the parſon, or other perſon who is entitled to Tithe hay; but it does not follow, when it ſtands for ſeed, and is not made into hay, that the ſeed may not be ſmall Tithes. Rape-ſeed, carraway-ſeed, turnip-ſeed, and muſtard-ſeed, are ſmall Tithes; but if the herb be growing with other graſs and made into hay, it would be a great Tithe." And all the barons agreed in opinion that the bill ſhould be diſmiſſed. Baron *Parker* ſeemed to doubt it, as it partook of the nature of the ſtalk, from whence it was taken.

The *predial* great Tithes now appear to be corn, grain, hay, clover-graſs, (when made

made into hay) wood, underwood, and beans and peaſe (when ſown in fields).

And the predial ſmall Tithes are flax, hemp, madder, hops, garden-roots, and herbs, as potatoes, turnips, parſley, cabbage, ſaffron, and the fruit of all kinds of trees, as apples, pears, acorns, &c. all kinds of ſeeds, as turnip-ſeed, parſley-ſeed, rape-ſeed, carraway-ſeed, anniſ-ſeed, clover-ſeed, &c. and beans and peaſe, if ſowed in a garden.

For the better illuſtrating of the before-mentioned particulars, each of them will be treated of reſpectively.

Firſt, the Tithe of corn is due of common right, and ought accordingly to be duly ſet forth and paid. 1 Roll. Abr. 644, Noy. 1. Roll Rep. 72. 2 Sid. 283.

Alſo of common right, i. e. where the cuſtom is not otherwiſe, the owner of the corn ought to cut down and prepare the ſame, i. e. divide it from the nine parts bind it into ſheaves, put it into ſhocks, cocks, or heaps; and if the owner refuſe to do it, the parſon may ſue him for the ſame in the ſpiritual court; but then the ſuit ought to be ſpecial, for not ſetting them 1 Roll. Abr.

forth in cocks, and not generally for not
Wats, c. 49. ſetting them forth.

But having made the corn into ſheaves, he is not bound to ſet it up in ſhocks, or caſt it into (larger) heaps, unleſs the cuſtom of the place oblige him thereunto; but having either bound it into ſheaves, or made it into cocks, he may ſet forth the Tithe thereof accordingly; after which he may heap his own ſheaves, or do with them as he pleaſeth. And the Tithes being ſo ſet forth, the owner of the corn is not bound to watch or look after them till the parſon
Noy. 31. 1 Roll. Abr. 644. carries them away. Who may carry them away immediately they are ſet out, or leave them a reaſonable time (of which the law conſtitutes a jury, the judges,) but then it is at his own riſque, if ſtolen or injured, unleſs the privity of the farmer be proved; in which caſe they may be recovered of the farmer.

If a preſcription be to pay certain ſheaves of corn for all Tithes of corn, this is no
Wats. c. 49. good preſcription; for the pariſhioners ought to make it into ſheaves; and therefore part of his duty in kind, cannot be in ſatisfaction of the reſidue.

If the cuſtom of the place be to meaſure forth

forth to the parſon the tenth part of the corn whilſt growing upon the land; it ſeemeth that this manner of Tithing ought to be obſerved; or if the cuſtom be, that the parſon ought to have for his Tithe of corn, the tenth land of corn, beginning at ſuch land as is next to the church, this cuſtom is good, but when in ſuch caſe the pariſhioners by covin, to defraud the parſon did not manure and ſow ſuch lands, (the corn of which would by the cuſtom be to the parſon) ſo ſufficiently as their other lands, and the parſon therefore did ſue in the ſpiritual court generally for the tenth ſheaf or ſhock, and a prohibition was awarded becauſe it was ſaid that the parſon might have his remedy at the common law for the fraud; yet afterwards in the ſame caſe a conſultation was granted, *Wray* Chief Juſtice ſaying, that this cuſtom was againſt common reaſon; but he agreed if the cuſtom be good, the parſon may well have his action on the caſe, for the fraudulent manuring or ſowing of the lands. Ibid. Leo. 99. 2 P. W. 569.

And yet it ſeems ſuch a cuſtom may have a reaſonable foundation on this ſuppoſition, that the field where thoſe lands or ridges lay, was originally a common waſte field belonging to the townſhip, and that on an agreement of the pariſhioners to turn it into

arable, they conſented to allot the tenth land or ridge by them ſown, to the parſon; but he to reap it, &c.

Wats, c. 49. If the cuſtom be that odd ſheaves or ſhocks, under the number of ten, ſhall not be Tithed by reaſon that they ſet up the Tithes in heaps or ſhocks, which of common right the owner of the corn is not bound to do; the owner is not bound to divide the ſaid ſheaves, or ſhocks, and ſet forth the tenth thereof, for that ſuch cuſtom upon ſuch conſideration is good.

2 Inſt. 652. It is laid down in all the old books, that Tithes are not to be paid for the herbage of meres or balks in corn fields; but that the ſame are freed thereof by the common law and cuſtom of the realm.

Ibid. So if a man pays Tithes of corn, he ſhall not pay any Tithes for the ſtubble which groweth the ſame year upon that land, though the ſame be cut for thatch or other uſes.

1 Roll. Abr. 641. So if a man pays Tithe of corn, he ſhall not pay any tithes for the after paſture of that land, for that ſame year, nor for agiſtment in ſuch after graſs.

1 Roll. Abr. 641. Notwithſtanding theſe great authorities, the

the modern determinations in equity are directly contrary; for that the balks and meres, the ſtubble, and after eatage are as much a part of the increaſe of that ſame year as the corn. Vide. Infra.

A cuſtom or preſcription may be within a pariſh, that by reaſon they have not ſufficient meadow for milch kine and draught cattle, they have uſed to cut ſome of their tares green, and give them to the ſaid cattle; and to be diſcharged of ſetting out or paying Tithes of the ſaid tares; and this is a good cuſtom or conſideration for that the parſon hath an advantage thereby as well as the pariſhioner, viz. in the Tythe milk and manuring of the other corn lands. 2 Leon 27. God. 430.

And *Wray* chief Juſtice ſaid, the matter and cauſe is the want of meadow and paſture; and that the ſurmiſe is, as if it had been ſaid, that for want of meadow and paſture, they had uſed to eat their meadows with their plough cattle, and for ſo much as they did eat to pay no Tithes, which he allowed to be good. S. C. 3. Cro. 139. Bunb. 279.

So if a man according to the cuſtom of the country doth ſow his land to feed his horſes for tillage, and the uſe hath been to ſuffer

ſuffer ſuch horſes to feed on the land without mowing of the grain; the parſon ſhall not have any Tithes thereof, becauſe it is no more than paſture for his horſes.

Soames Caſe cited, 1 Roll. Abr. 646.

The tenth ſheaf or ſhock being ſet forth for Tithe, as aforeſaid; if the owner of the corn ſhall, after the ſheaves or ſhocks are carried away, rake over the land on which the corn grew, by the cuſtom of this realm no Tithes are due, or ſhall be paid, for ſuch rakings; as cited to have been adjudged, and yet the contrary was held, viz. that Tithes ſhall be paid of rakings, becauſe the tenth ſheaf or ſhock of corn is a ſatisfaction for no more than the grain of which it is the Tithe, and can be no ſatisfaction for the rakings; and this ſeems alſo to be ſo agreed and adjudged.

2 Inſt. 652. Moor 278. 1 Anderſ. 199. Bud & Adams Caſe.

3 Cro. 363. Jeſſop Paine's Caſe.

So it is ſaid to have been adjudged in Sir Charles *Moriſons*'s caſe, that if one preſcribed to pay the tenth part of corn in the ſheaf for the Tithes of all that are in the ſheaves, and of all which is raked, it is a void preſcription, becauſe the owners of the corn are to pay the Tithes of both; alſo the preſcription is unreaſonable, for then the owner might put the leſſer part into ſheaves, and leave the greater part to be raked.

3 Cro. 446.

In

In the laſt mentioned caſes there appearing a difference in order to obviate it, it muſt be obſerved, that if the cuſtom be laid to put the corn, into ſheafs or cocks, and to pay the tenth ſheaf or cock in ſatisfaction of the Tithes of the corn, and of the rakings *minus voluntarie* diſperſed this is good. And the books generally ſay, that if the corn reaped be not covinouſly ſcattered or left unbound with intent to deceive the parſon, then no Tithes are to be paid of the rakings but if fraudulently ſcattered or left, and ſo raked, then the Tythe of all the rakings is to be paid.

1 Roll. Abr. 645. Moor 910. 1 Roll. Rep. 379. 3 Cro. 475. 690 and 702. 3 Bulſt. 243. 3 Keb. 251. 284.

If a prohibition be granted upon a ſuggeſtion that a perſon is ſued for rakings in the ſpiritual court, without any averment that the rakings were *minus voluntarie* diſperſed, it is good; for that it ought to be ſhewed on the part of the defendant, in order to have a conſultation that the rakings were foul rakings, and of conſiderable value.

1 Roll. Rep. 379. Pitt Harris, 3 Cro 702.

Yet in the caſe of *Pitt* and *Harris*, as it is abridged in 1 Roll. Abr. 645, it is ſaid to be adjudged, that upon a prohibition the ſuggeſtion ought to be, that the rakings were *minus voluntarie ſparſæ*, otherwiſe it is not

not good; and that it is not ſufficient to ſay they were *lapſæ & diſſipatæ* in *collectione*.

It is not a good ſuggeſtion, that in conſideration the pariſhioner having barley, the greater part of which he cut down and bound into ſheafs, and put into cocks, whereof the parſon hath the tenth cock, that he uſed to leave a ſmall parcel of the barley ſtanding, to the intent to cut it down afterwards, to make bands for the rakings involuntarily ſcattered, and to be diſcharged of the Tithes of this ſmall parcel of barley when cut down.

1 Roll. Abr. 650. Saunders and Paraman.

It ſeems fully determined, that no Tithes are to be paid of rakings *minus voluntarie ſparſæ*, i. e. involuntary, as in a caſe reported in Freeman, where the court unanimouſly decreed that no Tithe ſhould be paid of involuntary rakings, but if any fraud, covin or deceit be practiſed, then the whole Tythe was to be paid.

Anon. 1 Freeman, 334, pl. 416.

If corn do ſhed in the fields, being beaten out by the winds, or loſt upon the ground, for that it was not ſeaſonably cut, and this corn do grow and become a crop in the following year, (which ſometimes happens) and is called ſelf-ſown corn, that Tithes ſhall be paid thereof, as Tithes of the land for

for the following year. For this is a yearly increaſe. 1 Roll. abr. 642.

If Tithes have been paid of corn growing in one year, and in the next year the ſame land is not ſeeded, but lies fallow, to the end of making it more fruitful in the third year, and then it is manured and ſown, no Tithe is to be paid for ſuch land in the ſecond year.

And it is a good *modus decimandi*, that in conſideration, they who ſow the lands are to reap, bind, and ſever the tenth from the nine parts, and ſet it up into heaps, that the parſon ſhall not have any Tithes of this land in the year next enſuing, the land lying ley, and not tilled or converted into paſture; for of common right the pariſhioner is not bound to gather and ſet up the Tithes in heaps, *&c.* 1 Roll Abr. 649.

The next predial great Tithe is hay; for the Tithe of hay in all lands Titheable in each pariſh, and of graſs cut for hay in orchards, *&c.* is a predial Tithe, and to be yielded to every patron, parſon, or vicar, who hath a right thereto. 2 Inſt. 652.

By a conſtitution of Archbiſhop *Winchelſea*, it is ordained, that the Tithes of hay, whereſoever Lind. 191.

whereſoever it groweth, whether in large meadows or ſmall, or in highways, ſhall be demanded, and (as is expedient) ſhall be paid to the church.

In the highways, *in chiminis*;---but in a conſtitution of *Gray*, archbiſhop of *York*, from which this conſtitution is taken, and in great meaſure copied, it is in *cheviſis*, in the fore acres or heads of the ploughed land; although the common law, as it hath been ſaid, will not admit of this.

Hetley 147. Lane 16. As, if in a pariſh there be a cuſtom, that the owners of the headlands have uſed, time out of mind, to make the Tithe of hay of the pariſh for the parſon, and in conſideration thereof to be diſcharged of the Tithes growing on the ſaid headlands; (a headland being a ſmall piece of land on which a team turns in ploughing) this is a ſufficient conſideration to make the preſcription good.

Noy. 15. But a preſcription to pay the tenth-part of corn, for the hay (and corn alſo) that grows upon the headlands, is not good, becauſe the tenth-part is due for the corn only.

Yet if the preſcription be, that the pariſhioner hath uſed to cut, or reap, bind or

or ſhock, the parſon's corn; in conſideration thereof to be diſcharged from the Tithe of the hay of his headlands; this is ſaid to be good and a reaſonable conſideration, becauſe the pariſhioner, by the common law, is not bound to reap, *&c.* the parſon's part. And by the civil law, the parſon is to have the tenth ridge of corn. But the reaſon of this caſe is diſallowed by Mr. *Watſon*, as being contrary to that of the other caſes before cited. And yet he admits that the ſetting the parſon's corn into heaps may be a reaſonable conſideration of the preſcription, becauſe they are not bound to do this of common right.

2 Leon. 70.

Watſ. c. 49.

And in ſeveral caſes it has been held, that a preſcription not to pay Tithes of hay growing on the headlands on which the horſes and plough turn, is good, without laying any conſideration for the ſame; but then it muſt be averred, that the headlands are but ſufficient to turn the plough upon; as in the caſe of *Chapman* v. *Barlow*. Bill filed by the plaintiff, as rector of *Radnage*, for the Tithe of headlands, *int. alia*, the defendant inſiſted that the headlands were only ſufficient to turn the plough upon, and the bill was diſmiſſed.

1 Roll Abr. 646. Bird v. White Cro. Car. 293.

Bunb. 183. pl. 260.

It

It has been determined, that if a man cut graſs, and before it be made into hay, but only into ſwathes, carrieth it away, and giveth it to his plough cattle for their neceſſary ſuſtenance, not having ſufficient for their ſuſtenance otherwiſe; no Tithes ſhall be paid thereof.

Roll Abr. 645.
Bunb. 279.

But in the caſe of *Webb* and *Warner*, M. 2. J. when the inhabitants of divers marſhes and fenny lands, who uſed to gather a rough hay, called fenny fodder, for want of ſufficient graſs to ſuſtain their beaſts in winter, alledged that they did this for the ſuſtenance of their beaſts, and the better increaſe of their huſbandry, and ought therefore to be freed from the payment of Tithes. The court held that this ſurmiſe was not ſufficient, for one may not preſcribe in *non decimando*; and that it is alledged they beſtow it upon their cattle there, that is not any cauſe of diſcharge; for ſo they may preſcribe for corn ſpent in their family, or for corn given for provender to their cattle, whereby no Tithe ſhall be paid.

Cro. Jac. 47.

It has been decided, that no Tithe is to be paid of the after-graſs, *de jure*, and that a cuſtom ought to be alledged to ſupport it.

1 Roll Abr. 640.

Sir

Sir *Simon Degge* ſays, that Tithes are not to be paid of the aftermaths of meadows; but if the meadowing be ſo rich that there are two crops of hay got in one year, there the parſon ſhall have Tithe of the latter as well as of the former crop. Dig. p. 2. c. 3.

But if the occupier of the land can preſcribe, that in conſideration the owner doth make the firſt tonſure into good and ſufficient hay, and ſet it forth in cocks ſufficiently dried, then he ſhall be diſcharged of the Tithes of the aftermowth; this is a good preſcription and diſcharge, by reaſon of the labour and coſts he beſtowed in making the firſt tonſure into hay. 1 Roll Abr. 640. 1 Cro. 404. 3 Cro. 660. Moor 910. 2 Cro. 42, 116.

Or if the preſcrption be to be diſcharged of the Tithe of the aftermowth only upon conſideration that they have uſed, time out of mind, to cut down the graſs of the firſt mowth, and the ſame to ted and ſhake abroad, and the ſame graſs ſo caſt and diſperſed abroad, to gather into weaks and wind-rows, and put it into ſmall cocks at their own coſts, this is ſufficient, though not made into perfect hay. Cro. Jac. 42.

The preparing of Tithe graſs and making it into hay, is a good conſideration upon which to ground a preſcription for the diſ-

charge of the tenth of all after-profit that may be made the ſame year of the ſame land; ſothat if the after-graſs be eaten with cattle, no Tithe ſhall be paid for the ſame.

Yelv. 86. Hetk. 98. 42 and 43 El. Johnſon Poppinger. 1 Jac. 1 Eccles. Vachin 3. Jac. 1. Eccles and Saunders v. Winterbolt.

In all which caſes prohibitions were granted in *B. R. & M.* 14. *Jac.* 1. *Johnſon* moved for a conſultation upon the ſaid prohibition granted, 43 *El.* againſt *Poppinger*, but it was denied. And *E.* 11. *Car.* 1. *Langford's* caſe in *B. R.* a prohibition was granted to a ſuit for fattening ſheep upon the after-paſture, and ſo *E.* 16. *Jac.* 1. *Nicholls* and *Hooper*.

1 Roll Abr. 648 and 649.

But in that caſe *Popham* ſaid, that "he had known it to be reſolved, that of common right, without any ſpecial cuſtom alledged, no Tithe ſhall be paid of an aftermowth, and ſo by conſequence, not of the after-graſs depaſtured; for that the rule of law is, that Tithes ſhall be paid *ex annuatis renovantibus ſimul et ſemel* only."

2 Cro. 42. Hob. 250.

If a man pay Tithe of hay, that no Tithe, *de jure*, ought to be paid afterwards for the paſture of the ſame land, for the ſame year; for he ſhall not pay Tithes twice in a year for the ſame things; for the after-paſture is only the relics of the hay which paid Tithe before.

2 Inſt. 652. 1 Roll Abr. 640.

It

It is ſaid, if an innkeeper doth pay Tithe-hay of certain land, and the reſidue of the year after doth put into the ſame land the horſes of his gueſts, which come to market in the ſame town, no Tithes ſhall be paid for the herbage of thoſe horſes, for this is but the after-paſture of the land whereof he hath before paid Tithe; *per cur*, nor ſhall Tithes be paid for agiſtment in ſuch after-paſture. 1 Roll. Abr. 641. 2. H. 4. Rot. Parl. 93.

Of common right it ſeemeth, that graſs is Tithable when it is put into graſs cocks, and not before; for that then the tenth may be ſevered from the nine parts. Wat. c. 49.

The way of ſetting out the Tithe of hay appears in a caſe cited by my Lord Chancellor *King*, in the caſe of *Fox* v. *Ayde*: 2 P. W. 523. when it being objected that the pariſhoners ought, *de jure*, to make the Tithe-graſs into hay; his Lordſhip declared the law to be otherwiſe, and interrupted the counſel when they began to ſpeak to this, ſaying, "that all the pariſhioners were bound to do, was to cut down the graſs, and divide it into ten parts, after which the parſon was to make it into hay."

But whatever the owner is obliged to do of common right, the cuſtom of every place

is to be obſerved; and therefore, if the cuſtom be to meaſure out the tenth part of the graſs ſtanding for the Tithe thereof, and that the parſon ſhall cut and make it, this is good. And in this and all other caſes, when the Tithe of the graſs is ſet forth, and the owner is not bound to make the graſs into hay; the parſon may, *de jure*, make the graſs into hay upon the land on which it grew, although the uſage, time out of mind, hath been to the contrary; and it is needleſs for the parſon to alledge a cuſtom for the doing of it.

Watſ. c. 49.

If the caſes above cited are minutely looked into, and it is conſidered that the parſon or vicar, is *de jure*, entitled to Tithe in kind; and that moduſes, preſcriptions, cuſtoms, &c. are no more than uſurpations upon that right; and that although ſuch moduſes were, at the time of their being eſtabliſhed, the full value of the Tithes, yet owing to money decreaſing, and land increaſing in value, the clergy inſtead of being paid one-tenth, do not actually (under a *modus*) at this time receive in many caſes one-thirtieth part; and the modern deciſions, although not ſtrictly applicable to this caſe, ſay, that the owner of the Tithes is entitled to one-tenth of the produce of the earth, and that, by common right, in kind.

I con-

I conceive, however great the preſumption may be, that after-paſture, after-eatage, or after-mowth, are undoubtedly part of the increaſe of the earth, and therefore Titheable.

The editor of the laſt edition of *P. W.* in the caſe of *Fox* v. *Ayde*, in the notes on that caſe, obſerves, that the Tithe is mentioned to be the Tithe of hay, and not of graſs; and this diſtinction ſeems to be taken in 1 *Roll. Rep.* 172.—the caſe was, that one had uſed to pay a load of hay for all the Tithes of hay growing and renewing upon the lands where, &c. and alledged that they uſed to make the graſs into hay by their own labour, and a prohibition was denied by the whole court, upon this reaſon, that the pariſhioner ought to make the graſs into hay; and ſo this is but Tithes in kind, which cannot be a conſideration for a *modus decimandi*, no more than if a man ſhould preſcribe to pay certain ſheafs of corn for all Tithes of corn; for he ought of common right to make it into ſheafs; and therefore part of the duty in kind cannot be a ſatisfaction for the reſidue.

Although, as was before obſerved, Tithe of hay ought, *de jure*, to be paid in kind,

yet by cuſtom or preſcription ſome other conſideration may be due and payable in lieu thereof; but then, what is paid, how little ſoever the ſame be, muſt be to the benefit of him to whom the Tithe-hay, of common right, was payable. As,

Where one ſurmiſed, that, time out of mind, the owners of certain lands had found ſtraw for the body of the church, in diſcharge of all Tithes of hay, the court unanimouſly determined that this was no cauſe of diſcharge; for that the parſon was not chargeable with finding the ſtraw; nor had any benefit by others finding it. If it had been alledged, that the ſtraw was given to the parſon, and that he beſtowed it on the body of the church, it would have been otherwiſe.

Cro. El. 276.

Cro. El. 276. And it has alſo been ruled, *Hil.* 30 *Eliz.* that where one preſcribed that he had uſed to pay the pariſh clerk his wages, in ſatisfaction of Tithe-hay, this was no good diſcharge.

But a meadow in the pariſh, of which the parſon and his predeceſſors had been ſeiſed time out of mind, was judged a good conſideration for the pariſhioners to be diſcharged of Tithe-hay; for it ſhall be intende

tended that it was originally given on that account. 1 Roll. Abr. 649.

If there is a *modus* ſufficient to diſcharge the lands of the Tithe of hay, and the ſame lands are ſown divers years with corn, this doth not deſtroy the *modus*, but the ſame ſhall continue (or revive) when the lands are again turned into meadow or paſture; and whilſt they are ſown with corn, the parſon ſhall have Tithe in kind thereof. Trin. 10: Jac. 1. Brown's caſe Godbolt.

Thus far we have treated of the Tithes of corn, grain, hay, and graſs, as to the particular manner of ſetting them out, moduſes, cuſtoms, and preſcriptions, with the parſon or incumbent's remedy for the withholding or ſubſtracting of them, together with the owner of the Tithes right of action for not fetching them away, as they may be treated of, as relative to Tithes in general. I muſt refer the reader to them under their different titles, in the ſucceeding parts of this book.

That wood is a predial Tithe is plain, but whether great or ſmall, hath been a queſtion between the parſons and vicars; and it hath been reſolved, that if a vicar be only endowed with the ſmall Tithes, and have by reaſon thereof always had Tithe-

wood, in ſuch caſe it ſhall be accounted a ſmall Tithe, otherwiſe it is to be accounted amongſt the great Tithes. But this doth not alter the quality of the Tithe; and the vicar's having received it, may be evidence of a grant thereof having been made ſubſequent to the endowment, although ſuch original grant is now loſt; but is not evidence that wood in itſelf is a ſmall Tithe.

There is a doubt whether wood is, *de jure*, Titheable; as in the caſe of *Hicks* and *Woodſon*. It is ſaid that wood is not, *de jure*, Tithable, becauſe it doth not renew annually; and that, therefore, in libels in the ſpiritual court for wood, they alledge a cuſtom. Although it was ſaid, that the practice of the ſpiritual court at this day is otherwiſe; but the court did not regard that: for *Holt*, chief juſtice, ſaid, that "at this day they made all things Titheable."

Ld. Ray. 137. 2 Salk. 656.

In ſeveral of the old books the law is laid down to be otherwiſe, as in *Hobart*, 250; where it is ſaid, the Tithe-wood of coppices, and of all underwoods are payable, *de jure*, after they are cut; or, if there be a cuſtom for it, by meaſuring for the parſon the tenth acre. And this not only when they are cut to grow again, but alſo of the roots and branches when grubbed up

to

to make the land arable, and likewiſe the roots of hedges and hedge-rows, when they ſhall be grubbed up and ſold. 2 Bulſt. 236.

But in the caſe of *Jordan* v. *Colley* and others, on a bill by the rector for Tithe wood in the pariſh of Little Wenlocke, in the county of Salop, as it had been time out of mind paid in that pariſh, againſt the defendants, as vendees of Sir *William Forreſter*; the defendants in their anſwer ſay, that no Tithe hath been paid for this coppice-wood, called *Holebrook Coppice*, when felled before, and that they never heard that any Tithe or *modus* had been paid for wood in that pariſh. Bunb. 61.

It was inſiſted upon for the defendants, that Tithe-wood was not due of common right, and therefore that the proof lay upon the plaintiff, and that it was only founded upon a canon in Biſhop *Stratford*'s time, 17 *Edw.* 2.; and therefore that the defendants need not alledge any cuſtom or preſcription by way of exemption; but it was anſwered for the plaintiff that occupiers muſt always ſet forth an exemption.

And by the court, the defendants ought to have ſhewn ſome exemption; and there

is

is no inſtance that a pariſh can preſcribe in *non decimando* for Tithe-wood.

"But note," ſays the Reporter, *(Bunbury)* "although the defendants were decreed to account, I do not find that it is yet certainly determined that Tithe-wood is due of common right."

And preſcriptions in *non decimando* for Tithe-wood have often been allowed, particularly in the wilds of *Kent* and of *Suſſex*; which ſeemeth to ſuppoſe that it is not due of common right, but only by cuſtom.

Gibſ. 686.

1 Barn. 71. In the caſe of *Boulton* and *Hurſler*, T. 2. G. 2.—The plaintiff having libelled in the ſpiritual court for the Tithe of *Sylva cadua*, the defendant moved the court of king's bench for a prohibition; and the ſuggeſtion was, that they were timber trees, and of twenty years growth. It was urged further, that the court might grant a prohibition even upon the face of the libel, becauſe the demand is ſet forth generally, and therefore muſt be intended that this Tithe is due of common right; whereas the right of Tithe is only by cuſtom. And that was the reaſon given in the caſe of *Hicks* and *Woodſon*, why a hundred may preſcribe in a *non decimando* of Tithe-wood,

2 Salk. 656.

for

for as by cuſtom it grows due, by cuſtom it may be made not due.

The court ſaid, that this reaſon indeed was laid down by the judges of this court in that caſe; but they ſaid this has never been allowed for law by any of the other judges of *Weſtminſter-hall.* And it certainly is not law; for Tithe is as much due of *Sylva cadua*, by the law of England, as any other Tithe whatever. And Judge *Reynolds* ſaid, this may evidently be ſhewn not to be the reaſon of this law in relation to hundreds; for if it was, the ſame reaſon would prove, that every private man may preſcribe in a *non decimando* of this nature. And for this reaſon, and alſo becauſe the defendant, in the ſpiritual court, had not alledged in his plea, that the trees were of twenty years growth, a prohibition was denied.

By a conſtitution of Archbiſhop *Winchelſea*, Tithes ſhall be paid of trees, if they be ſold; which *Lindwood* explains of large trees, which bear no fruit, and being cut down are not fit for timber, but are uſed for fuel. Lind. 200.

By a conſtitution of Archbiſhop *Stratford*:---"Foraſmuch as divers perſons do refuſe Lind. 190.

refuſe to pay Tithes, which are notoriouſly due, of their *Sylva cædua*, and of the wood thereof being felled, which things do not require ſo much labour as the fruits of the ground, and think that they lawfully refuſe the ſame, becauſe they have not paid Tithes thereof in times paſt; and withal, do render it doubtful what ſhall be deemed *Sylva cædua*: We do therefore declare, that *Sylva cædua* is that, which of whatſoever kind of tree it is, is kept on purpoſe, and is mature and fit to be cut down, and which being cut down, ſprings again from the ſtumps or roots; and that the Tithe ought to be paid thereof as a real and predial Tithe; and that the poſſeſſors of ſuch woods ſhall by all manner of eccleſiaſtical cenſures be compelled to pay the Tithe thereof when cut down, as of hay and corn."

It appears that in ancient times there was a great controverſy between the clergy and laity about the Tithes of timber trees, which at length was ſettled by the *Stat.* 45. *Edw.* 3. *c.* 3. it is enacted as followeth: " At the complaint of the great men and " the commons, ſhewing by their petition, " that whereas they ſell their great wood " of the age of twenty years, or of greater " age, to merchants, to their own profits,

" or

" or in aid of the king in his wars, parſons " and vicars of holy church do implead " and draw the ſaid merchants in the ſpi- " ritual court for the Tithes of this wood, " in the name of this word, called *Sylva* " *cædua*, whereby they cannot fell their " woods to the very value, to the great " damage of them and of the realm; it is " ordained and eſtabliſhed, that a prohi- " bition in this caſe ſhall be granted, and " upon the ſame an attachment, as it hath " been uſed before this time."

By this ſtatute, it is out of doubt that timber trees of twenty years growth or more, or that are apt for timber, are free from the payment of Tithes, and are ſaid to be a parcel of the inheritance.

1 Roll. Rep. 100. Clinton's caſe. Moor 908.

But ſtill a doubt remained what trees were to be accounted great wood or apt for timber, by the ſaid ſtatute; and thereby made free from yielding Tithe. But the wood intended by this ſtatute, as laid down in 2 *Inſt.* 643, is ſuch as is fit for building of houſes and ſhips; and therefore, without doubt, it comprehends oak, elm, and aſh; but it hath alſo been adjudged to include beech as timber in *Buckinghamſhire* and ſome other counties, where better timber is not to be had, or is very ſcarce. And theſe trees

trees are free, not only as to the trunk of timber, but alſo as to the bark, root, and germins that grew upon the ancient ſtock; and it is not material how oft, or how ſeldom the branches thereof are lopped, becauſe being once free, they are always free.

2 Inſt. 643.

And it hath been alſo reſolved, that oak under twenty years, being fit for timber in time to come, ſhall not pay Tithe; and that though it ſtands till it is rotten, and unfit not only for timber, but for all manner of uſes, except the fire, it ſhall be privileged, upon this general maxim, that once diſcharged, always diſcharged.

1 Roll. Abr. 649.

And yet I take it, that being above twenty years growth alone, will not be ſufficient to diſcharge it from the payment of Tithe, for I ſhould conceive the privilege comes from the uſe, and not from the age. As in the caſe of *Buckle* v. *Vanacre*. Upon a bill for Tithe wood in *Erith* in *Kent*, about twenty years growth, part uſed for timber, and part made into billets and faggots, it was reſolved, that the laſt ſhall pay Tithes.

1692. Acton v. Smith. Franklin v. Jones, 1694. Cowper v. Layfield, Bunb. 99.

And in the caſe of *Greenaway*, Earl of *Kent*, timber trees above twenty years growth, cut and corded for fuel, and the bark ſtripped from the ſame, were adjudged to

Bunb. 98.

to pay Tithes as well as underwood; but that no Tithe was due of ſuch wood above twenty years growth, nor of the bark thereof which was not corded.

And in a caſe 3 *Cro.* 55. and *Moor* 908, *S. C.* it was held by *Wray* and *Clench* (juſtices), that if one doth cut trees which are or may be timber trees, as oaks, elms, aſh, &c. although they be under the age of twenty years, yet no Tithes are due for them. And ſo if trees of that age be cut, and new germins grow from them, no Tithes are due, though they be cut under that age.

In the caſe of *Walton* and *Lady Mary Tryon*, *December* 15, 1751. The plaintiff brought his bill, as rector of *Mitcham* in *Surrey*, for the Tithe of the tops and lops of old pollard oaks, aſhes, and elms; and of the tops, lops, and bodies of beeches. Mr. *Wilbraham* argued for the plaintiff: The Tithe of wood is certainly payable, and the law, as to this, is now pretty certain. The 45 *Ed.* 3. is an explanatory law; and all lops and tops are tithable, if the trees are under twenty years growth. Before the ſtatute of *Sylva cædua*, all were tithable; but by that law it is declared, that all timber trees ſhould be exempt: And the reaſon is plain; for timber trees yield but one profit,

profit, and that but once in a century; and therefore as it was ſo long before the owner had a profit, that wood was exempt. But even by this act it was not meant that the whole tree was exempt; the body only, not the tops and lops were ſo. Since this act, the courts have gone ſo far as to exempt all parts of the tree; and even germins from theſe trees have alſo been determined to be exempt. After this the courts endeavoured to bring it to ſome rule; and the buyers were always to pay the Tithes. Afterwards the courts held, that trees not converted to the uſe of timber were tithable; and on this ſome caſes have been determined. As the caſe of *Man* and *Somerton*. So the caſe of *Hawes* and *Cornwall*, where it is ſaid, that wood, for firewood, though of twenty-five years growth, ſhall pay Tithe when felled. So in the caſe of *Rapley* and *Lloyd*, all wood for burning was held tithable. In the caſe of *Briggs* and *Martin*, *E. 6. W.* a bill was brought by the plaintiff, as leſſee of the rectory of *Bromley* in *Kent*, for Tithe wood made into bavings. The defendants, by their anſwer, inſiſted that old pollards and dotards paid no Tithe; but notwithſtanding this, the court decreed an account and ſatisfaction to the plaintiff for them. The courts ſeem to have gone a ſtep further. They have had regard to

1 Brownl. 94.
1 Lev. 189.

the

the uſe made of the wood, and not to the age of the pollard: namely, what was uſed for timber, and what for fire wood; the former was held to be exempt, the latter to pay Tithes.

And agreeable to this was the caſe of *Greenaway* and the Earl of *Kent*, before the Lord Chief Baron *Ward*. The bill was brought by the plaintiff as vicar of *Walford* in *Herefordſhire*. The defendant inſiſted that no Tithes were due of ſuch wood as was above twenty years growth. A croſs bill was brought. And on hearing; the court declared the plaintiff was entitled to the Tithe of all wood above twenty years growth, as well as under, which was corded, but not otherwiſe.

But it may be objected, ſhall Tithes be ſo uncertain, as to be determined by the uſe of them? I anſwer, that in many caſes, Tithes muſt depend upon the uſe of them. As in wood, if it is made into baving for firing, it is tithable, if to make fences, it is not ſo. So if one fats cattle on land, agiſtment is due for them; ſo if he keeps cattle as barren, Tithes are paid: But cattle kept for the plough, are exempt, and even thoſe reared for the plough, are ex-

empt. Theſe are all eſtabliſhed caſes, and do not want any confirmation. The caſe of *Brook* v. *Rogers*, is very expreſs, that if timber is lopped before twenty years growth, Tithes ſhould be paid for the loppings. And if theſe trees, in queſtion, have been conſtantly cut, and Tithes have been paid of them, without any contradiction (as now is in proof), why is not this an evidence, that theſe trees were cut before twenty years growth, and ſo out of the ſtatute of *Sylva cædua?* And this preſumption may more naturally ariſe in this caſe, for the falls here happen but once in ſixteen or twenty years; and one of the plaintiff's witneſſes ſpeaks to Tithes being paid of theſe trees forty-five years ago, without any moleſtation whatſoever; and there is not one witneſs produced for the defendant, who will venture to ſwear, that even one load of timber was cut without paying Tithes: And if that be the caſe, the natural preſumption is, that this wood is tithable; for it had paid Tithes as long as memory can go back. As to the beech; if it be timber, as inſiſted upon by the defendant, then it comes within the ſtatute of *Sylva cædua*: And this matter muſt be tried if the parties think it worth their while to diſpute it.

Moor 908.

By

By Mr. *Solicitor General* for the defendant: The queſtion now put is, whether the lops and tops cut from trees above twenty years growth, are liable to pay Tithe, if cut in order to be uſed as fuel? And this is a queſtion of a very extraordinary nature indeed, and contrary both to old and modern law. For no point was ever laid down more clearly, from the time of *Edward* the 3*d*, to the preſent time, than this, that tops and lops of trees above twenty years growth, are always exempt: And the reaſon is, when once it is privileged, it always remains ſo. The caſe in *Moor* 908, cited for the plaintiff, is expreſsly for the defendant; for that particularly ſtates, that if not cut within the twenty years, then it is exempt. And ſo have been abundance of other caſes. And how can the right of the parſon ariſe from the uſe of the thing? How is it poſſible for the parſon to know the owner's intent? The right therefore ought to commence from the time it is cut and ſevered. The Earl of *Kent's* caſe does not prove the preſent diſtinction. For that proves, that the trees themſelves were in queſtion; and nothing at all was ſaid of the lop and tops. Beſides, they were not pollards and dotards, but young oaks. This proves that all trees cut down and uſed for fire, would be liable to Tithes. But this proves too

much. But there is a note on the back of Mr. *Brown's* brief in that cauſe, that ſettles what this caſe was: He ſays, there was poſitive evidence, that the trees corded had grown from ſtems of old wood, and was formerly coppice wood; and this will alter the caſe greatly.

The caſe of *Layfield* v. *Cowper*, *T.* 1698, was on a bill for Tithes of lops and tops of timber trees; the defendant inſiſted, that they were the product of beech and aſh trees; he admitted he did convert them to fuel and cord wood; but in regard that they were above twenty years growth, inſiſted that they were exempt: By the decree an account was directed for wood in general; and exceptions were taken to the remembrancer's report, that he had taken no notice that theſe beeches were ſome thirty and ſome fifty years growth, and were timber, and therefore exempt, and of that opinion was the court.

In the caſe of *Bibey* and *Huxley*, *H.* 1724. The bill was for Tithe of coppice and other wood: The defendant inſiſted that he had felled ſeveral timber trees of twenty years growth and upwards, and had dug up ſeveral roots, and made them into ſtacks, and made the tops into faggots; ſome were

uſed

uſed for repairs, others for fuel, and as theſe were all above the age of 20 years, the body with all the reſtare exempt from paying Tithes by law. And it was decreed that the plaintiff ſhould have an account of the Tithe wood; except for the Tithe of oak, aſh, and maiden trees of beech, proceeding from ſtools above twenty years growth. The application to fuel therefore does not make the difference.

But it is objected, that it muſt be preſumed theſe trees, now in queſtion, were cut before twenty years growth; and therefore never had the privilege: But as that is not charged by the bill, it cannot be preſumed. As to the beech, if inſiſted on, it muſt be tried.

By the Lord Chancellor *Hardwicke*, the Tithes demanded by the bill are of two ſorts; firſt, tops and lops of old pollard oaks, aſhes, and elms; ſecondly, beech trees, both body and branches. The principal queſtion ariſes on the tops and lops of old pollard oaks and the reſt. There is no difference in point of fact. It is admitted on both ſides, that there is no coppice wood in this ground; that they are ancient pollards: And as to the beeches, that they are of twenty years growth and upwards, and the greateſt part of them was cut and made into billets. and ſold for fuel, except a ſmall

a ſmall part of them, which was uſed for poſts and rails.

The plaintiff has proved, that at two former falls, Tithes were ſet out and taken of this wood, the one in 1712, the other in 1728.

On the other hand, the defendant has not proved any fall when Tithe was not paid; but has proved, that in theſe two falls, the family lived in *Northamptonſhire*, and knew nothing of their being ſet out aud taken, and that no other wood in the pariſh does pay Tithe, or ever had paid.

The plaintiff has founded his right on this; namely, the uſe and application of the things of which Tithe is demanded: But though this be the general right ſet forth in the bill; yet if any other right appears, the plaintiff will be entitled to an account. This is a queſtion of very great conſequence, both to the owners of wood, and to the clergy alſo; and it has been argued both from reaſon and authorities. And upon the reaſon of the thing, it has been ſaid, that there is no more reaſon why Tithes ſhould not be paid of wood, than of any other product of the earth for it *annuatim renovat:* But this proves too much; for according

cording to this reaſoning, all wood in general would be liable; and though this does *annuatim creſcere*, yet it does not *annuatim renovare*; at common law, coppice wood is ſubject to Tithes, though it does not *annuatim renovare* yet in its nature it ought to pay; for it is cut under a certain courſe of years, and it is looked upon as an ordinary ſtated renewal, like the caſe of *Saffron*; but of timber trees, the ſtated rule is otherwiſe, there the law does not wait for a ſtated courſe of ſelling. It was further reaſoned for the plaintiff, that the lops and tops of pollards are tenancy profits: But this is no rule of Tithes, and varies in different countries; and would make the affairs of Tithes very uncertain; and, in many places, the lops of ſpiral trees are allowed to tenants for fire wood, and yet ſuch lops are not tithable. It was further ſaid to be reaſonable, that the uſe and application ſhould determine, whether the thing was tithable or not; that as a coppice is liable, ſo it is reaſonable that any other wood, not timber, but uſed for fuel ſhould be ſo too: But this goes to the queſtion put in iſſue by the bill, and, I am afraid, would be a very dangerous innovation; the ſubſequent uſe of the thing, as it does not alter the nature, cannot give a tithable quality which it had not before; if it could, why not *vice verſa*, that is to ſay, if wood, not timber, ſhould be applied

to the uſe of timber, why ſhould not ſuch uſe exempt it from the payment of Tithes? This was never heard of, yet it is equally reaſonable. It is ſaid, there are certain caſes, where the uſe and application of the thing ſhall make it tithable; and there will appear no greater uncertainty in the one caſe than in the other; as for inſtance, wood cut to be burned in the houſe of a pariſhioner, this was ſaid not to be tithable, but that is not true, unleſs by cuſtom; for it was otherwiſe determined in the caſe of *Norton* v. *Hermer*. It was ſaid alſo, that cattle for the plough and pail are not tithable; ſo there the uſe determines: But this is not a predial, but a mixt Tithe, which the pariſhioner is not obliged to ſet out at a particular place or time, and the parſon receives it in another manner, by taking the tenth part of the profits.

Cro. Cha. 113.

In many caſes it is impoſſible to ſay to what uſes the wood may be applied, the owner may ſell it ſtanding, the buyer to cut it; and, if ſo, how is the intention to be known; and in many counties where timber is very plentiful, it is often cut down and uſed as fuel; and if the uſe and application were to prevail, it would make two different common laws of Tithe, and this without any cuſtom. The law for Tithes of wood is a poſitive law, to wit, that

that of all timber trees of twenty years growth or upwards, whether timber by law or cuſtom, no Tithe is to be paid, either of bodies, lops, or tops.

It has been much controverted, whether the ſtatute of *ſylva cædua* is a new law, or only declaratory of the common law: The latter is now the ſettled opinion, for the words of the ſtatute are, "it hath been uſed "of old." In the ſtatute the wood is particularly mentioned, and its age and growth; but not one word is ſaid of the uſe; and the opinion of all the courts upon the conſtruction of this ſtatute has been, that where the tree is timber, by law or cuſtom, of twenty years growth or upwards, it is exempt. And in 2 *Inſt.* 642, 643, the rules are very particularly laid down. Theſe rules have not been contradicted, except in the caſe of germins that came from old ſtools, and which is the caſe of moſt coppices in *England*. But it is aſked, what difference is there, if germins grow from trees intirely cut down, or from trees that have been lopped? I anſwer, that the difference is great, for in the caſe of germins that come from ſtools, no tree remains from whence the privilege is derived, but in the caſe of lops and tops, the tree remains, and ſo does the privilege.

I come

I come now to conſider the caſes cited againſt the doctrine by the counſel for the plaintiff. The caſe of *Man* and *Somerton*, 1 *Brownl.* 94. is not applicable to the preſent caſe. The caſe of *Hawes* and *Cornwall*, 1 *Lev.* 189, is this; "Wood cut for firing, "though above twenty years growth, ſhall "pay Tithes; and ſo pollards of above "fifty years:" But this is very ſhort and imperfectly ſtated, and is not ſupported by law at all; and by the report of ſame caſe, in 1 *Sid.* It is ſaid, that the wood was coppice wood; and by the determination, moſt probably it was ſo, and therefore proves nothing for the plaintiff.

But it is ſaid, there is no difference between pollards and underwood, for pollards are not timber: But I anſwer, that pollards having gained this privilege, always retain it; and the bodies of pollards may ſerve to many uſes as timber doth; and if dotard trees are privileged, much more ought pollards. The next caſe cited was that of *Brigs* and *Martin*, which was on a bill for lops and tops of old pollard and dotard trees; and an account was accordingly directed: But on what this was founded, does not appear, nor whether theſe pollards were under the time of privilege or not; and what makes this caſe the more extraordinary

dinary is, the decree in the caſe of *Northley* and *Colbe* in the very next term, and it is directly contrary; and the only way of reconciling theſe two caſes is, that in the firſt caſe, it muſt have appeared the pollards were cut before twenty years growth.

Greenaway and the Earl of *Kent* was the next caſe, and moſt principally relied on; and the ground of this decree was, that all wood, even above twenty years, that was cut and corded, ſhould be tithable; and goes further than any caſe before or ſince: But the Lord Chief Baron *Ward*, in that caſe, was of a quite different opinion, and made a learned argument againſt the decree; but the other three barons differed from him; therefore I obſerve that this was not a uniform authority; and I think the Chief Baron *Ward's* opinion was the beſt: Baron *Price's* reaſons, in that cauſe, do not ſatisfy me at all; when he was conſidering the ſtatute of *ſylva cædua*, he ſaid, that ancient ſtatutes muſt be conſtrued according to the intent, and not literally; and that great wood does not, in its ſtrict ſenſe, mean trees of this ſort, but ſuch wood as is applicable to large buildings; which is, in effect, to ſay, that a tree, which in its nature is timber, yet if it is not large, and is applied to firing, ſhall be tithable;

tithable; another ground that he went upon was, the ſtatutes relating to the rules of felling wood, but theſe are rules laid down only for the preſervation of timber, and cannot be applicable to Tithes that are demanded of them: And upon the whole, this determination is directly contrary to all the other authorities; for there is a *tempus conſtitutum*, and that cannot be departed from; and I will ſay further, that there has been no precedent ſince to follow it; for as to that caſe of *Bibey* and *Huxley*, that is rather againſt it.

If theſe trees, now in queſtion, were lopped and made pollards before twenty years growth, and ſo have continued to have been lopped, then they will be liable to Tithes: But this is a queſtion of fact, proper to be tried, being too much for me to determine upon the evidence now laid before the court; I am rather inclined to think, that they were not, for the plaintiff himſelf, in his bill, has ſtated them to be ancient pollards and large.

The ſecond queſtion relates to the Tithes of beeches, both bodies and branches: And it is not diſputed but that this wood is above twenty years growth: And then the matter of fact muſt be tried, whether

it

it is timber by the cuſtom of the country: And if ſo, it will be exempt; otherwiſe it muſt pay Tithes.

In the above caſe it appeared, that the loppings of the trees, for the Tithe of which the bill was brought, were not of twenty years growth; but it appearing that the trees were of the age of twenty years, before they had ever been lopped, it was decreed by Lord Chancellor *Hardwicke*, that Tithe was not due of the loppings, for that if a tree be once privileged from paying Tithe, the privilege extended to all future loppings, of whatſoever age they were. 5 Bac. Abr. 59. pl. 78.

There muſt yet remain a difficulty oftentimes in fixing the exact age of oaks, aſhes, and other trees; which frequently ſpring from ſeeds ſhed on the ground, of which no account is, or can be kept by the owner or any other.

But in many places where wood is plentiful and grows freely, it is the cuſtom to eſtimate the ſame by meaſuring round the middle part of the tree; and if it is twenty-four inches in circumference, it is deemed twenty years growth; but if under that meaſure, it is accounted underwood.

But

But in the caſe of *Lloyd* v. *Mackworth*, a bill for Tithe wood; the defendant inſiſted that it was timber, but did not ſay that it was not above twenty years growth.

Bunb. 126, pl. 198.

Per cur. Timber will be preſumed to be above twenty years growth, unleſs the plaintiff proves to the contrary.

Of wood not fit for timber, Tithe ſhall be paid. As of beech, hazle, birch, willow, white-thorn, holly, alder, maple, aſp, horn-beam, and ſuch other like trees of baſe and inferior nature, and unfit for buildings; of theſe Tithes ſhall be paid, although above twenty years growth.

1 Roll Abr. 640.

Yet the ſcarcity of other timber (as hath been ſaid) and cuſtom of the country to put ſuch trees to the uſes of good timber, may free them, being of twenty years growth or under, from payment of Tithes; as hath particularly been adjudged of beech, &c. in *Buckinghamſhire*, where it is accounted timber, and has the privilege of being Tithe free.

1 Brownl. 94. 1 Roll Rep. 355. Noy 30. Moor 541.

Although trees, once good timber, ſtand till they are fit for nothing but fire wood, and are cut for that or the like uſe, yet no Tithe ſhall be paid thereof, for that being once

once discharged of Tithes, they are always discharged.

3 Cro. 477. Goldsbo 145. Moor 541. 2 Cro. 100. 1 Roll Rep. 100.

It is said to be held by the whole court, that if a man doth top a tree, apt for timber, under the growth of twenty years, and suffering the body to remain, doth, after it is timber, and free from the payment of Tithes, lop it again, no Tithes shall be paid of such loppings. For if the tree be free, so are the loppings or branches.

1 Brownl. 33. 1 Roll Abr. 640.

There is a case in *Moor* 908. *Brook* v. *Rogers*, is very express, that if timber is lopped before twenty years growth, Tithes should be paid of the loppings.

Walton v. Tryon.

And of this opinion was Lord Chancellor *Hardwicke* (in a case before mentioned), where he said, that if a tree was once lopped before it was of the age of twenty years, all future loppings of whatsoever growth they might be, were liable to the payment of Tithe. Which opinion seems to be good law at this day.

There is a case in 2 *Leon* 79, which says, that in a wood, where the most part of the trees are timber, and as such, free from Tithe, and there grow *sparsim* among those trees, other trees in their nature tithable

ble, and the owner fells the whole wood, and cauſes it to be promiſcuouſly cut down, and bound up into faggots together: here for that the moſt part of every faggot is of wood Tithe free, and the reſidue thereof is of ſo little value, that the ſeverance thereof, from the Tithe free wood, would not quit the charge; therefore, in this caſe, no Tithe ſhall be paid for any of the wood or faggots. But, on the other hand, if moſt part of the wood be underwood, or trees tithable when cut, and there grow therein *ſparſim* ſome oak, elm, or aſh, and the owner cuts down all the wood, and makes it into faggots promiſcuouſly, in ſuch caſe Tithes are to be paid of the whole. And it is ſaid, that in the foregoing caſe, a ſpecial conſultation was granted upon a ſpecial plea, that the faggots were part of wood tithable. And ſee 3 *Cro.* 347. whereby it ſeems to be taken, that the greater part being Tithe free wood, ſhall free the leſſer part.

However, if in this caſe only ſome ſmall part of the wood is of wood Tithe free, poſſibly put in with deſign of defrauding the parſon, and the parſon ſues in the ſpiritual court for the Tithes of the faggots, and a prohibition is obtained, upon a ſurmiſe that they are of wood Tithe free:

if

If the parſon will have a conſultation, he muſt ſhew the ſpecial matter, viz. how much of the faggots were of tithable wood and that the wood Tithe free was ſo intermixed therewith, that he could not otherwiſe ſue than for the faggots, and thereupon pray a conſultation, otherwiſe no conſultation will be granted.

But Lord Chancellor *Hardwicke*, as ſtated in 5 *Bacon's Abridgement* 60. *pl.* 84. ſeemed rather inclined to think the contrary way, for he ſaid, that when the wood of a coppice is felled, ſome trees growing therein, which are of the age of twenty years, and have never been lopped, are lopped, and the lopping promiſcuouſly bound up in faggots with the coppice wood, Tithe muſt be paid of the whole, for that it would be very difficult to ſeparate the tithable wood from that which was not ſo, and the owner ought to ſuffer for his folly, in mixing the latter with the former. And which opinion ſeems founded on good reaſoning for taking it the other way, there are ſuch great inlets to the practiſing of frauds on the parſon, which by following Lord *Hardwicke*'s opinion are intirely avoided.

If young fruit trees, or other like trees, are planted in a nurſery or other place, with

deſign to be rooted up, and ſold to be planted in other pariſhes, tithes ſhall be paid thereof. If the owner ſells them, and pulls them up himſelf, the owner ſhall pay the Tithe; but if he ſell them particularly to another, the vendee ſhall pay the Tithe.

1 Cro. 526.
2 Jon. 416.
1 Roll Abr. 637.
God. 431.
Hard. 380.

Upon a bill in equity filed. M. 16, Car. 2. for the Tithes of a nurſery, at the hearing, ſeveral queſtions were made and determined.

Firſt, whether Tithes ſhould be paid of nurſeries if they yield no other fruit?

Second, whether Tithes ſhould be paid for thoſe trees that yield fruit which pay Tithes?

Third, if ſome yield fruit and others not, whether or no, thoſe that yield fruit, privilege and exempt the others that yield none, when they are all ſold together?

Fourth, whether Tithes ſhall be paid for them, when they are ſold and tranſplanted within the ſame pariſh.

After conſidering, the court decreed Tithes in all the above caſes, there yet remains a doubt as to the ſecond query; for

in

in 2 Inſt. 621, and 1 Roll Abr. 641, it is ſtated, That if a man pays Tithes for the fruits of trees, and afterwards cuts down the ſame trees, and maketh them into billets or faggots, and ſelleth them, he ſhall not pay Tithes for the billets or faggots, for that is not a new increaſe, which ſeems to be the better opinion, and upon the ſame principle it has been adjudged, that if a man doth cut a coppice, and thereof pays the Tithe of the wood, and then before any new branches are grown, doth grub up the roots and ſtubs of the wood, he ſhall not pay Tithes of them, becauſe they are parcel of the freehold and do not renew yearly. Which ſeems to be a good reaſon, and agreeable to the nature of Tithes, as they are eſtabliſhed *per legem terræ.* 1 Roll Abr. 637.

Tithes of all underwoods are to be paid, though the wood be ſpent for fuel in the houſes of perſons uſing lands in the pariſh where it is cut: For that when the Tithe of ſuch wood was demanded in the ſpiritual court, and a prohibition was granted on a ſurmiſe, that the wood was ſpent in the houſe for firing, and that there was a cuſtom in the pariſh, that the owners of any houſe or lands within the ſame pariſh, who pay Tithes to the parſon, ought not to pay Tithe of wood ſpent in their houſes, and

iſſue being joined on this cuſtom it was found for the defendant, *i. e.* that there was no ſuch cuſtom. And it was moved in arreſt of judgment, that although it be found againſt the cuſtom, yet no Tithes ought to be paid of wood ſpent in the houſe, nor for fencing ſtuff for hedges; and that ſuch boots for hedge houſe and fire are to be diſcharged of Tithes by the common law.

1 Cro. 113. Hetley 88.

But the court reſolved *contra*, and ſaid that it was uſual in prohibitions to alledge cuſtoms upon conſideration of an hearth penny, or that they have other woodlands whereof they pay Tithes, and by reaſon of the wood burnt there, the Tithes are bettered, ſo that the parſon hath a benefit thereby, but not to alledge a diſcharge by the common law; and a conſultation was awarded.

A prohibition was prayed to ſtay a ſuit for Tithed wood, the plaintiff ſuggeſted that he had a houſe in the pariſh, and that the wood was cut for fuel burnt in this houſe; the court ſaid, that this would not ſerve, unleſs it had been expreſſed, that the houſe was for the maintenance of huſbandry, and that by reaſon thereof the parſon has *uberiores decimas*.

1 Vent. 75.
2 Keb. 628.
S. C.

In

In *M. T.* 9, *W.* 3. it was determined, that wood employed to hedge or fence corn, where parſon had Tithe corn, ſhould pay no Tithe, and it was ſaid to be a general rule, that no Tithes ſhall be paid for any thing whereby the Tithes are increaſed. Anon. 1 Freeman, 334, pl. 416.

Of wood, cut to make hop poles, and ſo employed, where the parſon or vicar hath Tithe of hops, no Tithes are due. S. C. Bunb. 20.

By cuſtom (upon a conſideration) wood ſpent in a houſe, may, without doubt be Tithe free; for it is a cuſtom in the north parts, to give an half penny for eſtovers burnt by which they are free from the Tithe of wood burnt for fuel. Hetl. 85, 88. Lit. 143.

If a man cut his wood and burn it, to make bricks for the neceſſary enlargement or reparation of his houſe, within the pariſh, for the neceſſary habitation of him or his family, no Tithes ſhall be paid for this, becauſe that the parſon has therefore the better benefit of the labour of his family. Hetl. 93. Lit. 5. 1 Roll. Abr. 645.

But if he cut his wood and burn it, to make bricks, for the enlargement of his houſe within the pariſh, more than is neceſſary for his family, being only for his pleaſure and delight, he ſhall pay Tithes there-

of, and a conſultation was granted accordingly; where the plaintiff in prohibition had aſſumed, that he burnt it for the neceſſary reparation and enlargement of his houſe generally, not ſaying for the neceſſary habitation of his family. For the court ſaid, by this ſurmiſe he might make a caſtle and yet pay no Tithes.

1 Roll Abr. 645.

In the caſe of *Gee* v. *Pearch*, the court divided upon the queſtion, whether Tithe of aſh of above twenty years growth ſhould pay Tithe, when uſed for the plough and cart. The Chief Baron and Bury, inſiſting that the wood muſt be uſed in building to exempt it from the payment of Tithe. But Lord Chancellor *Hardwicke* ſeemed to think, that it was not the uſe which aſcertained whether the wood was Tithe free or not.

5 Bac. Abr. 60. pl. 84.

But whatever the parſon's dues be as to the Tithe of wood or trees by common right, yet by cuſtom or preſcription upon a conſideration alledged, a parſon, town, hamlet, or diſtrict, may be freed from the payment thereof.

1 Roll Rep. 355.

If a parſon hath a certain wood, or a certain parcel of wood allotted to him by the lord of a manor, and that in conſideration thereof,

thereof, he and his tenants have been time out of memory free from the payment of the Tithes of their underwoods, and Tithable trees within the ſame pariſh or the like, this is a good diſcharge.

And in that caſe, *Coke* ſaid, that in the pariſh where he lived, Tithes had never been paid of wood; and that the parſon had a wood there called the Tithe wood, for which he pays fourpence yearly, to the lord of the manor of whom he holds it; and therefore it ſhall be intended, that it was given upon a conſideration for all the Tithe wood within that pariſh, for that no Tithe wood hath ever been paid there. 1 Roll. Rep. 355.

When wood is Tithable, it is ſet out while ſtanding by the tenth, acre, pole, or perch; or when cut down, by the tenth faggot or billet, as the cuſtom hath been; or if there be no cuſtom, then the general rule ſeemeth to be, ſo ſoon as the tenth can be ſevered from the nine parts. Wood 62, C. 2.

Of underwoods ſold ſtanding the buyer ſhall pay the Tithe. Godbolt 455.

A preſcription by one, to pay a certain rate for the Tithe of all willows cut down by him within the pariſh, was declared to be

void: but to have preſcribed for all willows cut down upon his own land, would have been good.

Godbolt 60.

As Tithes are to be paid of divers ſorts of trees, ſo ſhall they be paid of the fruits and produce of ſuch trees; and although timber trees of the age of twenty years or upwards; of acorns and maſt, ſevered from thoſe trees, Tithes are to be paid becauſe they renew yearly.

11 Co. 49.
1 Roll Rep. 100.
Moor 762.

Dr. *Godolphin* ſays, maſt of oak or beech, if ſold, the tenth penny is payable for the Tithe thereof; but if eaten by ſwine, then the tenth of the value or worth thereof.

God. 417.

And there is a writ of conſultation in the regiſter for the Tithes of pannage. And Lord *Coke* ſays, for acorns tithes ſhall be paid, becauſe they renew yearly. And in *Reynolds* caſe, *I.* 2, *Jac.* it was ſaid of acorns ſevered, Tithes were payable.

Gibs 676.
Mo. 7, 676.

But where the caſe was, that the acorns dropt from the trees and the hogs eat them, a diſtinction was made, that they ſhall not be Tithable unleſs gathered and ſold.

Hetl. 27.
Lit. 40.
Gibs. 676.

And

And as of acorn and maſt, Tithes are payable, ſo of the fruit of all other trees, whereof profit is made; as of apples, pears, plumbs, cherries, *&c.* are all predial Tithes, to be paid in kind when gathered; unleſs there is ſome *modus* or rate Tithe paid in lieu thereof. God. 408.

Which fruits, if they are ſtolen and not gathered by the owner, the parſon as well as the owner ſhall bear the loſs: But if the owner doth ſuffer a ſtranger to pull or take his fruits, the Tithe ſhall be anſwered. Hetl. 100.

If fruits are ſold, there ſhall be paid the tenth penny: and if they are not ſold, but the hogs do feed thereupon, then the owner of the hogs ſhall pay the Tithe according to the value of ſuch fruit. Lindw. 200.

If the ſoil of an orchard is ſown with any kind of grain, the payment of the Tithes of the fruit of the trees, ſhall be no diſcharge for the payment of Tithes of the grain; for they are of ſeveral and diſtinct kinds. 2 Inſt. 652. 1 Roll. abr. 642.

But if a man pays Tithes for the fruits of the trees, and afterwards doth cut the ſame trees, or make them into billets or faggots, and ſells them, he ſhall not pay Tithes for Deg. p. 2, C. 3. God. 427.

ſuch

ſuch billets or faggots, for they are no new increaſe.

In many places, by cuſtom, ſome ſmall rate, as fourpence, or the like, is to be paid as the Tithe of the whole orchard or garden; and if any place where ſuch preſcription is, a new orchard be planted, the owner ſhall be Tithe-free thereof, paying only the accuſtomary rate, as for the old orchard.

Hetl. 85.

And yet, by *Hutton*, if a man has an ancient garden, for which he paid a penny yearly, and the garden is afterwards enlarged, of that enlargement Tithes ought to be paid in ſpecie.

Hetl. 94.

The Tithe of fruit ſeems to ſtand as thus: if gathered they ſhall pay Tithes in kind; and the tenth-penny, or two ſhillings in the pound, in all ſuch like caſes, is not to be conſidered as excluſive of the Tithes to be paid in kind, but only as a reaſonable ſatisfaction when the pariſhioner diſpoſeth of the whole of his produce unſevered.

As before obſerved (if no cuſtom, &c. to the contrary) Tithes are to be paid of all garden herbs and roots, as mint, parſley, annis,

annis, rue, ſage, cabbage, turnips, potatoes, beans, peaſe, &c.; and theſe are ſmall predial Tithes.

And of ſaffron, hops, flax, hemp, weld, woad, madder, ſeeds of all kinds; and theſe are likewiſe ſmall predial tithes.

Potatoes are a ſmall Tithe, although ſown in large quantities.

Turnips when pulled ought to pay Tithes, though never ſo often ſown, and though upon the ſame land. As in the caſe of *Benſon* v. *Watkins*, *H.* 3. *G.* 1. the court declared the Tithe of turnips to be due *toties quoties*, though ſevered never ſo often in the ſame year.

Turnips are Tithable though ſowed on the ſame land after corn, and eaten by unprofitable cattle, as in a caſe *M.* 6. *G.* 1. *Crow*, tenant under the church of *Rocheſter*, of the Tithes in the hamlet of *Modingham*, in the pariſh of *Cheppinhurſt*, in *Kent*, againſt *Stoddart*. The court declared, that the Tithe of turnips ſowed after corn, and eaten by unprofitable cattle, to be due; though it was urged to be an improvement of the land, and that the parſon has the benefit of it the next year. And in *T.* 9. *G.* 1. in the Bunb. 10. pl. 12.

the caſe of *Harwood*, vicar of *Erith*, in *Kent*, againſt *Railſton*. The court declared Tithe to be due of turnips, ſowed after corn in the ſame year, and fed upon on the land by barren cattle.

Bunb. 314. And in the caſe of *Swinſen*, v. *Digby*. The court declared, that where land was ſown with turnips, after the corn was cleared and fed with ſheep and barren cattle, that Tithe ſhould be paid of ſuch turnips, though it was inſiſted upon for the defendant, that the ſoil in the county of *Stafford* was dry and ſandy, and that this method of huſbandry improved the land, ſo that the plaintiff had *uberiores decimas* of corn, and had received the Tithe of the lamb, and wool of the ſheep, ſo fed before, but the court over-ruled this defence, and ſaid it amounted to a *non decimando* as to turnips.

From the above deciſions it appears, that if cattle are fed upon turnips unſevered from the ground, an agiſtment Tithe ſhall be paid for ſuch cattle; but if the turnips are ſevered from the ground, then the Tithe in kind of ſuch turnips ſhall be due from the ſeverance.

If

If tobacco be planted here, the Tithes thereof are ſmall Tithes. Godb. 316.

In general, a certain conſideration in money is paid in lieu of the Tithes of garden, either by cuſtom or agreeement with the parſon. If the cuſtom be a parochial cuſtom, or extending to gardens throughout the pariſh; the enlargement of a garden doth not make Tithe become due in ſpecie; but otherwiſe, if it is a ſpecial preſcription for this or that garden. And the ſame thing is to be ſaid of orchards. Accordingly in the fore-mentioned caſe of *Franklin* and the Maſter and Brethren of *St. Croſs*, it was decreed by the court that a penny for gardens and orchards, can only be for ancient gardens and orchards. Bunb. 79.

Saffron alſo is Tithable, though gathered but once in three years.

And in caſe the vicar ſues the impropriator for the Tithes of ſaffron in the eccleſiaſtical court, no prohibition ſhall go. 2 Roll. Abr. 310.

So, if the field was formerly ſown with corn, and afterwards be ſown with ſaffron; the Tithes ſhall be paid to the vicar; for per *Popham*, the Tithes of ſaffron heads are ſmall Tithes; and though the Tithes of the

the field have been paid to the parſon, yet when converted to another uſe whereof no graſs Tithes come, the vicar ſhall have the Tithes.

Ow. 74.
God. 414.

The Tithe of hops is predial, and regularly accounted among ſmall Tithes.

Thus in the caſe of *Franklin* and the maſter and brethren of *St. Croſs*, *T.* 1721, the vicar being endowed of ſmall Tithes, it was decreed, that he was thereby entitled to hops, being a ſmall Tithe, though of growth ſince the endowment.

Bunb. 79.

Alſo, in *Vent.* 61.---It is ſaid that hops are of the nature of ſmall Tithes.

The Tithes ſeem from the above caſes, and from the undermentioned deciſion, to be ſmall Tithes, as in the caſe of *Wharton* and *Liſle*, the court held that the Tithes of hops, whether in gardens or fields, were a ſmall Tithe.

Cited in
Com. 638.

There can be no *modus* for Tithe-hops, becauſe the court will take notice, that hops have not been ancient, but uſed in beer of late times only, being introduced into *England* about the year 1524; yet a preſcription to pay ſo much in lieu of all ſmall

ſmall Tithes, may include hops, and ſuch other ſmall things of new invention. 1 Sid. 443. 1 Vent. 62. 2 Keeb. 612.

Tithes of hops are not to be paid till after they are picked, and before they are dried; every tenth meaſure. Bunb. 20.

In a late caſe, Mr. *Chandler*, planter, at *Maidſtone*, in *Kent*, having ſet forth the Tithe of his hops by the tenth pole unpicked, Mr. *Bliſs*, the impropriator, brought this matter before the court of exchequer; where, after a long debate of counſel on both ſides, and reading three former decrees, the court declared this method of ſetting forth to be illegal. Bunb. 20.

And in the caſe of *Walton* v. *Tyers*, *May* 17, 1753.—Mr. *Tyers* having planted a conſiderable number of acres with hops, in the pariſhes of *Mickleham* and *Dorking*, in *Surry*, of both which pariſhes Mr. *Walton* was incumbent, offered to pay to him after the rate of twenty pounds per acre for the Tithe thereof. Which Mr. *Walton* refuſed. Whereupon Mr. *Tyers* gave him notice, that on ſuch a day he would begin to gather his hops, and would regularly ſet out every tenth hill through all his hop plantation as the Tithe thereof, by ſevering the bind of the hops from the ſoil, and leaving 5 Bro. Par. Ca. 99.

leaving the ſame on the poles; and that he would in the ſame manner daily ſet out the Tithe of his hops, in order that Mr. *Walton*'s agent might be preſent at the reſpective times of ſetting out the Tithe, and might carry away the ſame in due time. Mr. *Walton* ſaid that this method of Tithing was new, and contrary to law, and that he would not take the Tithe in that manner; but that he expected the whole crop ſhould be gathered, and afterwards meaſured in baſkets, and that every tenth baſket of hops, after being ſo meaſured, ſhould be ſet out for the Tithe thereof.

This Mr. *Tyers* refuſed to do, and proceeded, according to his notice, to ſet out the Tithe in manner abovementioned, leaving every tenth hill ungathered, having cut or ſevered from the ſoil the binds or ſtems on which the hops on every ſuch tenth hill grew; and renewed his notice daily, whilſt his hop-gathering continued. Mr. *Walton* did not meddle with the Tithe ſo ſet out; and after the hops had continued for ſome months upon the poles, on every tenth hill, as aforeſaid, ungathered, and ſo became ſpoiled and rotted, Mr. *Tyers* brought an action for damages againſt Mr. *Walton* foraſmuch as he was thereby hindered from dreſſing and cultivating his hop-

plantations

plantations. Upon this Mr. *Walton* filed his bill in the exchequer againſt Mr. *Tyers*, thereby inſiſting, that the manner in which Mr. *Tyers* had ſet out the Tithe of his hops, by leaving the hops on every tenth hill, and ſevering the binds from the ſoil, was not a proper method for ſetting out ſuch Tithes; but that the Tithe of hops ought by law to be ſet out after the ſame are picked from the bind or ſtem.

At the hearing the court declared, that the method of Tithing hops inſiſted on by the defendant in his anſwer, is not a good ſetting out of the Tithe of hops; but that hops ought to be picked and gathered from the binds before they are Tithable.

Mr. *Tyers* appealed to the houſe of lords; ſetting forth that the manner of ſetting out Tithes by the admeaſurement of the hops in baſkets, would be very inconvenient and prejudicial to both parties, as the hops by ſuch means would be neceſſarily bruiſed, the flower and condition thereof, and the hops thereby very much damaged; that it hath been uſual of late years for hop-planters to direct their gatherers to pick or aſſort their hops into different pokes, according to their different degrees of fineneſs and colour, to wit, the fine and the

brown; and ſuch aſſortment is the moſt material and expenſive part of the manufacturing of hops, thrice as much time and expence being required in picking and aſſorting hops into two different parcels, as is neceſſary in picking them into one poke when firſt gathered; and that it is unreaſonable that perſons claiming Tithes, ſhould have the benefit of this part of the manufacture of hops, which coſts about five pounds an acre, without making any allowance, or contributing any ſhare to the expence; and praying relief for theſe, amongſt other reaſons. Firſt, there is no poſitive law to regulate the manner of Tithing hops; neither is it fixed by immemorial uſage or cuſtom; the determinations of courts relating thereto have been various, and therefore that manner of Tithing ſeems more juſt and equitable, which is both the leaſt prejudicial to the owner, and moſt beneficial to the parſon or impropriator. Secondly, the manner inſiſted on by the reſpondent, by picking and then ſetting out the Tithes by admeaſurement in baſkets, is ſo very detrimental to the planter, that it muſt inevitably be the ruin of the plantation of hops, the cultivation whereof is of extenſive benefit to this kingdom. The method inſiſted on by the appellant is undeniably fair and equitable, not liable to

any

any fraud whatſoever; whereas the method inſiſted on by the reſpondent is avowedly oppreſſive and injurious, in no wiſe productive of any benefit, or preventive of any fraud.

Mr. *Walton*, the reſpondent, hoped the decree would be affirmed, amongſt other reaſons, for theſe following:---Firſt, the ſetting out the Tithe of hops by meaſure after they are picked from the bind or ſtem, is the faireſt and moſt equal method, and liable to the leaſt inconvenience; whereas the method of Tithing contended for by the appellant, by every tenth hill, would be liable to great fraud, inaſmuch as the planter of hops would have a right to ſet out for Tithe every tenth hill, to be computed from the place he began at; and he might any year determine before he manured his hop-ground, where he would begin to ſet out the Tithe, and thereby would certainly know every tenth hill through the whole plantation, and might neglect to manure or improve them ſo much as the other hills, which would be unjuſt and unreaſonable.

Secondly,---The method of Tithing contended for by the appellant, would give occaſion to many diſputes and controverſies; as the hops growing on one hill are

apt naturally to intermix with the hops growing on the hills adjoining, ſo that it is ſcarce poſſible to ſever the one from the other intire; and the owner of Tithes, or his agents or ſervants, exerciſing the right of entering into the hop-grounds, and pulling up the planters poles, muſt frequently furniſh matter for ſuits and vexations; which would be inconvenient both to the owner of the Tithes and the pariſhioners.

Thirdly,---The appellant hath not made the leaſt proof that the Tithe of hops was ſet out before they were picked from the bind or ſtem, or that they were picked by the tenth hill (which is the method of Tithing he contends for); but on the contrary, in many inſtances where the method of ſetting out the Tithe-hops has been diſputed or brought in queſtion, it has been uniformly determined and adjudged, after ſolemn argument, that the Tithe of hops by law ought to be ſet out by meaſure, after they are picked from the bind or ſtem.

And the lords affirmed the decree.

The Tithes of flax and hemp are predial, and reckoned *minutæ decimæ*, notwithſtanding they are ſown in large fields.

Gibſ. 688.

There

There having been formerly great diſputes about the Tithe of hemp and flax in kind, in order to prevent the like diſputes for the future, a *modus* was eſtabliſhed by act of 3 and 4. *William* and *Mary*, c. 3. of 4s. per acre, and afterwards it was raiſed to 5s. per acre by the 11th and 12th *W.* 3. c. 16.

" Whereas an act made in the third year " of the reign of his preſent majeſty, and " the late queen, entitled an act for the " better, &c. was made to continue " but for ſeven years, and to the end of " the next ſeſſion of parliament, after ſuch " term ended, and is now expired; and " whereas the ſaid act hath by experience " been found very uſeful and neceſſary, " be it therefore enacted, by, *&c.* that " from 25 *March*, 1700, all and every " perſon or perſons who ſhall ſow, or " cauſe to be ſown, any hemp or flax in " any pariſh or place in *England*, *Wales*, and " *Berwick*, ſhall pay, or cauſe to be paid, " to every parſon, vicar, and impropriator " of any ſuch pariſh or place, yearly and " every year, the ſum of 5s. and no more, " for each acre of hemp or flax ſo ſown, " before the ſame be carried off the ground, " and ſo proportionably for more or leſs " ground ſo ſown; for the recovery of

" which ſum or ſums of money, the par-
" ſon, vicar, or impropriator ſhall have the
" common and uſual remedy allowed of by
" the laws of the land.

" Provided that this act, or any thing
" herein contained, ſhall not extend to
" charge any lands diſcharged by any *modus*
" *decimandi*, ancient compoſition or other-
" wiſe diſcharged of Tithes by law.

" Provided always, that nothing herein
" contained, ſhall extend or be conſtrued
" to extend, to make any alteration in the
" right or manner of payment of Tithes of
" flax or hemp to any eccleſiaſtical perſon,
" incumbent of any parſonage, vicarage,
" or curacy, or to any impropriator or body
" corporate, having or holding any impro-
" priation for ſuch ground as hath at any
" time ſince the 2d day of *February*, 1684,
" and before the 2d day of *February*, 1691,
" been ſown with flax or hemp, and paid
" Tithe in kind to ſuch incumbent, im-
" propriator, or body corporate reſpec-
" tively, but that the ſame ſhall continue
" and be payable, and paid as fully and in
" ſuch manner as formerly, any thing in
" this act to the contrary notwithſtanding.

And

" And this law to continue in force for " ſeven years from the ſaid 25 *March*, " 1700, and thence to the end of the next " ſeſſion of parliament, and no longer."

Which act has been continued by 6 *Ann. c.* 18, and made perpetual by 1 *Geo.* 1. *ſtat.* 1. *c.* 2. *ſect.* 8.

The Tithe of woad is a ſmall Tithe, as determined in the caſe of Sir *Richard Uvedall* v. *Tindall*. The queſtion was on a ſpecial verdict, if woad was ſmall Tithe or great, and it was unanimouſly agreed that woad was ſmall Tithe. Hut. 77. Cro. Car. 28. S. C.

And in 1 *Sid.* 447, a prohibition was prayed to a ſuit by a vicar for Tithe of woad, ſuggeſting it to be a great Tithe, the court doubted, becauſe it is reckoned, as the book ſays, *inter minutas decimas*. 2 Keeb. 628. 1 Mod. 50. 1 Vent. 75. S. C.

So, in 1 *Sid.* 443, on a motion to a ſuit for Tithe of hops, it was ſaid, that hops, woad, and ſuch ſmall things of new invention, are *minutæ decimæ*.

Upon the principle laid down in the laſt mentioned caſes, madder may be reckoned *inter minutas decimas*.

And for the better regulation of the Tithing of ſame, by the 31*ſt Geo.* 2. *c.* 12. which was in force for fourteen years, and by the 5*th Geo.* 3. *c.* 18. (it is continued for fourteen years, to commence from the expiration of the firſt fourteen). It is enacted as follows:---" Whereas madder is an in-
" gredient eſſentially neceſſary in dying and
" callicoe printing, and of great conſequence
" to the trade and manufactures of this king-
" dom, and may be raiſed therein equal in
" goodneſs, if not ſuperior, to any foreign
" madder; therefore for the encouragement
" of the growth thereof, it is enacted, that
" every perſon who ſhall plant, grow, raiſe,
" or cultivate any madder, ſhall pay to the
" parſon, vicar, curate, or impropriator of the
" pariſh or place, the ſum of five ſhillings an
" acre, and no more, and ſo proportionably,
" in lieu of all manner of Tithe of madder;
" for the recovery whereof, the parſon, vicar,
" or impropriatorof the pariſh or place, ſhall
" have the common and uſual remedy allow-
" ed of by the laws of this realm.

" Provided that no madder ſhall be
" carried off the ground on which it grows
" before payment of the ſaid ſum herein di-
" rected, in lieu of Tithes.

" Pro-

" Provided alſo, that this ſhall not extend " to charge any lands diſcharged by any " *modus decimandi*, or otherwiſe diſcharged of Tithes by law."

The reaſon of this act fully appears in the preamble; for madder was, prior to the paſſing of it, imported into this kingdom at a very great and enormous price; the people were afraid of cultivating it, owing to the great hazard and expence in preparing the ground, and procuring the plants neceſſary for ſo doing, *&c.* the legiſlators, therefore, to encourage the produce of ſo uſeful an article, held out this encouragement, amongſt others:---for the ſpace of twenty-eight years of being diſcharged from the payment of Tithes in kind, for the trifling ſum of five ſhillings per acre, where they muſt otherwiſe have paid five pounds; for, upon a moderate computation, the produce of one acre would amount to fifty pounds. The end of the act being anſwered, it is now expired, and it has never been continued. The Tithe therefore of this plant muſt now be paid in kind, unleſs otherwiſe agreed for between the parſon or proprietor of the Tithe and the pariſhioner.

The

F. N. B. God. 414. Tiet. 77. Cro. Car. 3.

The Tithes of honey and wax are paid in kind, as in the caſes of *Barſcot* and *Norton*; where prohibitions were prayed, for ſuing in the ſpiritual court for Tithes of divers kinds, and, *int. al.* for Tithe of honey, upon a ſurmiſe that it was not payable in kind, for that bees are only *volatilia & feræ naturæ*, and it was thereupon demurred. But the opinion of the court was, that Tithes in kind are to be paid for honey, for ſo is the book, and therewith agrees *Lindwood*, and therefore the court awarded a conſultation.

God. 457.

And in 1 *Roll. Abr.* 635, it is ſaid, that Tithes ſhall be paid in kind of wax and honey *de jure*.

The Tithe of them is to be paid by the tenth meaſure of honey, and the tenth weight of wax.

Reput. Canon 389.

And there is a conſultation provided in the regulation for the Tithe of honey and wax of bees.

CHAP.

CHAP. III.

MIXT TITHES.

Their ſeveral Kinds and Incidents, as of Cattle; alſo of Milk, Cheeſe, Wool, Agiſtments, &c. when, and in what manner payable, and what Modus, Cuſtom, or Preſcription therein is good or not; alſo of the Tithes of Turkies, Geeſe, Hens, Pidgeons, Eggs, &c.

ACCORDING to the method propoſed in this chapter, perſonal Tithes ought to be treated of, but conſidering that mixt Tithes do bear a nearer analogy to predial, and, in ſome caſes, are with difficulty diſtinguiſhed from them, it ſeems moſt according to the natural order of things, and as more coherent to the ſubject matter of the precedent chapter, to treat of

MIXT TITHES:

ariſing principally from the ſeveral creatures which are fed and nouriſhed by the fruits or produce of the earth, do, as is ſaid

ſaid before, participate of both qualities, predial and perſonal, and therefore are called mixt.

The Tithes of colts, calves, lambs, kids, pigs, milk, cheeſe, agiſtment or paſturage, eggs, chickens, *&c.* are mixt Tithes.

The parſon, of common right, is entitled to the tenth calf, *&c.* to be taken when weaned; and it is recoverable in the ſpiritual court, as appears from a writ of
Gibſ. 708. conſultation in the regiſter.

And yet by cuſtom, though ſuch calves are fewer than ten, the parſon may have one of them every year; as, if there be only ſeven, the parſon to have one; and if there be a leſs number than ſeven in one year, the owner to pay a halfpenny for each of them, is a good cuſtom; but where
Latch. 254. the cuſtom is, that he ſhall have one of ſeven, as calves, pigs, *&c.* there he ſhall not account the young in two years, and ſo have the ſecond year one in kind, but only have a halfpenny for each of them in both years.

The moſt equitable way, and which, as it ſeemeth, hath become the general cuſtom, is, that if there are five, the parſon

ſhall

ſhall have the value of half a calf, *&c.*; if there are ſix, he ſhall have one entire, and ſhall receive or pay out reſpectively a proportionable ſum for each number under five or above ſix.

The common and canon law differ, as to letting the Tithe run on till one becomes due in the enſuing year; the common law will not allow of it, and which ſeems the better founded of the two, becauſe Tithe muſt be paid annually. As in the caſe of *Egerton* and *Still*, *T.* 1725, it was decreed, that where there are above ten calves, lambs, pigs, or the like, the Tithe of the odd number above ten ſhall be paid according to the value, and not carried over to the next year. 1 Roll. Abr. 648. Bunb. 198.

Colts are Tithable in the ſame manner as calves.

Tithe of pigs is alſo to be paid in the ſame manner as Tithe of calves. God. 416. Bunb. 133.

And lambs are Tithable in the ſame manner, unleſs the cuſtom of the place be otherwiſe.

In the caſe of *Heaton* (impropriator of *Garnthorp*, in *Lincolnſhire*) againſt *Regal*;--- the

the defendant inſiſted on a cuſtom in that pariſh, to ſet forth Tithe of lambs on the
A. D. 1721. firſt of *May*. But the court diſallowed of it; for that they were not fit to live without their dams, as appeared by the depoſitions in the caſe; and it was referred to three neighbouring juſtices of peace to enquire what was a fit time for ſetting forth Tithe lambs in that country; who certified the firſt of *Auguſt*, in their judgment, to be a proper time; and the court approved of it.

A. D. 1721. So in the caſe of *Crofts*, rector of *Upper Clatford*, in *Hampſhire*, againſt *Vincent*. The defendant inſiſted on a cuſtom in that pariſh to ſet forth Tithe lambs at *St. Mark*'s *Day*. The court declared it to be a void cuſtom; and that the time for ſetting forth Tithe lambs is, when they are fit to live without their dams, and thrive on the ſame food that their dams live on, and when the owner weans his own.

T. 9. G. And in the caſe of *Reynolds*, rector of *Stoke Charitie*, in *Hampſhire*, againſt *Vincent*. The defendant inſiſted on the ſame cuſtom with that before inſiſted on at *Upper Clatford*. Which on citing the two former decrees, and hearing counſel on both ſides, was again ſet aſide for the ſame reaſon.

By

By a conſtitution of Archbiſhop *Winchelſea*, it is ordained as follows:---" Of the young of animals, as of lambs, we do ordain, that for ſix lambs and under, ſix halfpence be given for the Tithe; but if there be ſeven lambs in number, the ſeventh lamb ſhall be given to the rector for Tithe; yet ſo, that the rector of the church who taketh the ſeventh lamb, ſhall pay to the pariſhioner of whom he taketh the Tithe three-halfpence in recompence; he that taketh the eighth lamb ſhall give a penny; he that taketh the ninth ſhall give an halfpenny to the pariſhioner; or the rector ſhall, if he pleaſeth, ſtay till the next year, until he may take a full tenth lamb; and Lind. 191. he who ſo ſtayeth, ſhall take always the ſecond beſt lamb, or the third at leaſt."

And according to the value of money at the time when this conſtitution was made, theſe ſums were computed as a reaſonable equivalent.

But for the reaſon before obſerved, that part of the conſtitution which relates to the Tithe running on until the next year, is not allowed by the common law, for Tithes are to be paid annually.

And

And, as before mentioned, theſe canons or conſtitutions muſt in all caſes give way to the cuſtom of the place; for however juſt they might be at the time of their original inſtitution, decreaſe in the value of money, and the increaſe in the value of other articles, have at this time rendered them in many inſtances quite unequitable.

The general cuſtom of places with regard to the Tithe of lambs, is the ſame as that of calves, *&c.---viz.* that the perſon ſhall have half of a lamb when there are but five, and a lamb entire when there are ſix, and ſhall receive or pay out proportionably for the numbers under five, and above ſix.

For the reaſons ſtated in the above caſes, and from the general deciſions on this ſubject, it ſeems, that no preciſe and determinate day can be fixed which will be equally applicable to all places and ſeaſons, and this muſt, beſides, depend upon ſo many collateral circumſtances, which would render ſuch a thing impracticable; yet a general rule may be eaſily eſtabliſhed from the above deciſions; namely, that the propereſt time for the parſon to take his Tithe is, when the owner weaneth the reſt; for the farmer, from the principle of ſelf-intereſt, it is to be ſuppoſed, will not permit

mit the lambs to be weaned too ſoon, for fear of hurting them, neither will he let the lambs remain with the ewe too long, for fear of damaging the ewe.

And regularly, the time of payment of the Tithe of lambs, *&c.* is when they are weaned, and can live without the dam; unleſs the cuſtom of the place be otherwiſe. God. 416. Bunb. 133.

And as the parſon receives the Tithes of the young, and increaſe of the cattle, ſo he on his part is to obſerve the cuſtom of the place, for their better propagation and increaſe; otherwiſe, any inhabitant may have an action on the caſe againſt him. As in the caſe of *Yielding* v. *Fay*: an action was brought againſt the defendant as parſon of *Quarbey*, in the county of *Southampton*, declaring, that within the pariſh there is a cuſtom, that the parſon at all times of the year had uſed to keep a common bull and a boar, for the common uſe of the kine and ſows of the pariſhioners, for the increaſe of calves and pigs within the pariſh, and that the defendant being parſon there, had neglected to keep them, by reaſon whereof the plaintiff, being an inhabitant, had loſt the increaſe of his cattle. And the court were of opinion that this was a rea- Cro. El. 569.

ſonable cuſtom; and that every inhabitant prejudiced by the not keeping the bull and boar might maintain an action.

Bunb. 171. And the like was decreed in the caſe of *Phillips* and *Symes*, *T.* 1724.

2 Brownl. 60. When cattle yield other profit to the owner beſides their young, the Tithe of ſuch profit is to be paid to the parſon, as of the milk of cows, aſſes, goats, and ſheep, when their milk is preſerved by the owner.

But where one ſurmiſed that the cuſtom of the country where he lived was, not to pay any Tithes of milk of ewes, a prohibition was granted *percuriam*.

Roll. Abr. 654. Gibſ. 713.

Milk, as before obſerved, is a mixt Tithe.

Deg. p. 2. c. 6. Gold. 392. Where Tithe milk is paid in kind, no cheeſe is due; and where Tithe cheeſe is paid in kind, no Tithe milk is due; in which caſe, as in all other caſes, the cuſtom of the place is to be obſerved.

By a conſtitution of Archbiſhop *Winchelſea*; the Tithe of milk ſhall be paid from the time of its firſt renewing, as well in the month of *Auguſt* as in other months.

Lind. 199.

Lindwood

Lindwood doth not inform us under what pretence the people pleaded exemption from paying Tithe of milk in *Auguſt*; probably it was becauſe this was the principal harveſt month in the year; and, that as they then paid Tithe of corn, and fed their harveſt people with the milk, they thought it too much.

Lindwood, as before obſerved, explains the milk here ſpoken of to ſignify either that of cows, or ſheep, or goats, or other cattle which are milked. Lind. 200.

And by a conſtitution of Archbiſhop *Winchelſea*: " The Tithe of the milk and " cheeſe of cows and goats ſhall be paid " where they feed and couch; otherwiſe, " if they couch in one pariſh, and feed in " another, the Tithe ſhall be divided be- " tween the rectors." Lind. 199.

The law at preſent ſeemeth to differ from this conſtitution, as in the caſe of *Scoles* v. *Lowther*. *Lowther* was parſon of the pariſh of *Swillington*, and *Scoles* lived in *Kippax*, the next adjoining pariſh, and occupied a large parcel of arable land in *Kippax*, and had alſo forty acres of meadow and paſture in *Swillington*, and four acres of arable land. 1 Lord Raymond, 129.

Lowther libelled in the ſpiritual court of *York* againſt *Scoles*, for Tithes of the cattle depaſtured in *Swillington*.

Scoles, upon a ſuggeſtion that cattle kept for the pail, for the uſe of the houſe, ought not by the law to pay Tithes, and that this cattle, for the Tithes whereof *Lowther* now libels, is ſuch, moved for a prohibition.

And it was granted him, unleſs cauſe ſhewn.

And now, upon affidavit that *Scoles* carried the milk of this cattle to his houſe in *Kippax*, and uſed it there, it was moved that the rule might be diſcharged. And it was reſolved by the whole court, that the defendant, *Lowther*, ſhould have Tithes of this milk.

And by the ſame conſtitution---" It is " ordained, that in the pariſh where the " ſheep continually feed from the time of " ſhearing to the *Feaſt* of *St. Martin*, in " the winter, the Tithe of their milk and " cheeſe ſhall be fully paid to the church " there, although they ſhall be afterwards " removed from that pariſh and be ſhorn " elſewhere. And if within the aforeſaid " time they be removed to paſture in

" divers

" divers pariſhes, every church, according " to a proportionable part of the time, " ſhall receive the Tithe thereof; but no " ſpace leſs than that of thirty days ſhall be " reckoned in the computation. But if " after the *Feaſt* of *St. Martin* they be car- " ried to paſture elſewhere, and be fed " even until the time of ſhearing in one " or in divers pariſhes, in the paſtures of " their owner, or of any other, the paſ- " tures ſhall be valued, having reſpect to Lind. 197. " the number of ſheep, and according to " ſuch valuation of the paſtures the Tithes " ſhall be demanded of the owners of ſuch " paſtures."

And the reaſon aſſigned by *Lindwood* is, becauſe after the *Feaſt* of *St. Martin* ſheep are not uſually milked. And therefore this conſtitution requireth, that the Tithe be paid according to the value of the paſture for ſo many ſheep as are there depaſtured. Otherwiſe, if they ſhould lie there, and in the mean time give milk; and cheeſe ſhould be made thereof, then the Tithe of milk and cheeſe ſhould be paid as they ſhould fall out. Lind. 198.

The archbiſhop, by another conſtitution, has ordained, that the Tithe of milk ſhall be paid in cheeſe, whilſt the pariſhioner

maketh cheeſe; but in the autumn and winter it ſhall be paid in kind, unleſs the pariſhioners will for the ſame make a competent redemption to the value of the Tithe, and the benefit of the church.

Lind. 194.

This canon muſt, like many others, give way to the cuſtom of the place; for in many places they pay the milk in kind all the year; in ſome places they pay only cheeſe, and in ſome neither milk nor cheeſe, but ſome ſmall rate for it; and the cuſtom of the place in this, as in all other Tithing, is to be obſerved, notwithſtanding this canon. As in the caſe of *Leiceſter* v. *Foy*, *M.* 3. *Ann. B. R.*: a prohibition was moved to ſtay ſuggeſtion of a *modus*, that the inhabitants of that place did, from ſuch a day in *April* till *All Saints Day*, pay every tenth day's milk ſkimmed and made into cheeſe, and that, *ratione inde*, they were diſcharged of all Tithe milk.

Deg. p. 2. c. 6.

Eyre, againſt the prohibition, ſaid, "it was true making Tithes of one crop into hay will be a good cauſe of the diſcharge of Tithe of the aftermath; but he denied that it would be a good *modus* to ſay, that for making the aftermath into hay, they ſhould be diſcharged of the Tithe of the firſt

firſt crop; and that the *modus* here alledged amounts to a *non decimando* of the cream.

But for the prohibition was urged, *Cro. El.* 609. and *Moor* 909, a *modus* to pay the tenth cheeſe made from ſuch a time to ſuch a time, in lieu of all Tithe-milk, which though it be but for part of the year, yet being what they are not bound to do, is a good diſcharge of Tithe milk for all the year. And ſuppoſe it were to pay a groat a year for all Tithe milk, that would be good; and why not this? Raym. 277. Latch 222.

The court granted a prohibition, and directed the plaintiff to declare immediately. 6 Mod. 261.

It hath been adjudged a good *modus*, in conſideration of the tenth cheeſe made from the firſt of *May* until the laſt of *Auguſt*, to be diſcharged from the Tithe of milk; for this is not Tithe in kind of part in diſcharge of the whole, for no Tithe in kind is due of cheeſe, but only of milk; and ſo this is a good conſideration. 1 Roll. Abr. 651.

And in the caſe of *Hill* v. *Vaux*:---on a ſuit in the ſpiritual court for Tithe of milk, the plaintiff moved for a prohibition, ſuggeſting a cuſtom in the pariſh, that the 2 Salk. 656.

ninth of *May* at night, and the tenth of *May* in the morning, the parſon was to have the whole meals milk, and ſo every ninth and tenth night and morning, till a young lamb yeaned ſhould be heard to bleat, in lieu of all Tithe milk; and the caſe of thirty eggs in lieu of all Tithe of eggs, was cited.

1 Roll. Abr. 648, 651.

And *per cur.* a *modus* to pay one thing for another, or a part of the ſame thing in another manner, may be good; but a preſcription to pay the very thing itſelf that is Tithe can never be a good *modus*. Unleſs payable in ſome other manner, *i. e.* ſo as the parſon has a benefit by it. As to the caſe put of the thirty eggs, he is bound to pay that whether he has hens or no, and he muſt pay it at a certain time. But by this *modus* the parſon may have nothing; as, ſuppoſe a lamb be heard to bleat before the ninth of *May*.

3 Cro. 609.
2 Cro. 47.
1 And. 799.
1 Mod. 229.
Hob. 250.
Raym 277.
3 Bulſt. 326.

Bunb. 20. Tithe milk is to be paid not by the tenth part of every meal, but by every tenth meal entire.

In the caſe of *Scoles* and *Lowther*, before-mentioned, it was ſaid by the court, that of common right Tithe milk is payable in the parſonage or vicarage-houſe, in which particular

ticular this Tithe differs from all others, which muſt be fetched by the receiver; but by cuſtom the payment may be made in the church porch, whether it ſhall be brought by the pariſhioners. Wood, b. 2. c. 2. Lord Raym. 129.

Yet, notwithſtanding the above deciſion, there are ſeveral caſes of much later date the contrary way, as in the caſe of *Dodſon* v. *Oliver*:---it was decreed, that if there be any cuſtom in a pariſh for the manner of Tithing milk, as to carry it to the church porch or parſonage-houſe, that muſt be obſerved by the pariſhioners; but if there be no particular cuſtom or uſage, the pariſhioner is obliged *de jure* to pay every tenth meal, to milk the cows at the uſual place of milking in his own pails, and the parſon is obliged to fetch it away from the milking place in his pails in a reaſonable time, and if he does not fetch it before the next milking time, the pariſhioner may juſtify pouring the milk upon the ground, becauſe he hath occaſion to uſe his own pails. And it was determined by the whole court of exchequer in this caſe, that the milk ought not to be carried either to the church porch or to the parſon's houſe, and that it ought to be fetched by the parſon. And in the caſe of *Carthew* and *Edwards*, *T.* 1749:---*Edward Carthew*, clerk, rector Bunb. 73.

of

of *Saint Mewan*, in *Cornwall*, brought his bill in the exchequer, amongſt other particulars, for the Tithe of milk. The defendant, *Edwards*, in his anſwer ſet forth, that the appellant having declared that he would not ſend for or fetch the Tithe milk, he did order every tenth meal of his cows to be turned upon the ground, it not being uſual or cuſtomary for the pariſhioners of the ſaid pariſh to carry their Tithe milk home to the rector,

The court upon hearing the cauſe, and ordering two decrees in the ſaid court to be read, wherein *Dodſon* was plaintiff, and *Oliver* defendant, did declare, that the defendant ought to have milked the tenth meal of his cows in veſſels of his own, at the place and in the manner he milked the other nine meals, and that the plaintiff ought to have fetched it away in his own veſſels.

The way of ſetting out of Tithe milk ſeems fully ſettled in the caſe of Dr. *Boſworth*, rector of *Totworth*, in *Glouceſterſhire*, againſt *Limbrick* and others. The plaintiff charged by his bill (amongſt others) that he was entitled to receive the whole milk

M. Ter. 18. G. 3.

milked

milked on every tenth natural day, as well in the morning as in the evening.

The defendants ſaid, that they received notice from the plaintiff that from the fifth of *April* their next compoſition ſhould ceaſe. And that the plaintiff would expect to receive his Tithes in kind, unleſs the defendant would conſent to make ſuch a recompence for them as the plaintiff ſhould approve. That the plaintiff was ſo very exorbitant in his demands, that they did not chuſe to compound with him, and therefore gave him notice in writing that they ſhould ſet out the Tithe of milking at their uſual milking places in the afternoon of the tenth of *April* then next, and continue it in like manner. The defendants ſaid, that they conſtantly in the years 1772 and 1773 had ſet out the tenth meal of milk, ſuch meal being an evening's meal only.

It was proved on the part of the plaintiff that the evening's meal of milk was near one third leſs than the morning's meal, and therefore the plaintiff inſiſted that being entitled to the full tenth, that the Tithes ought to be ſet out morning and evening on the tenth or natural day, and not the evening's meal of every fifth day.

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The opinion of the court was delivered by Mr. Baron *Eyre* as follows:—" The plaintiff by his bill complains, that he hath been defrauded of one-third of his Tithe milk, by the ſetting forth the Tithe on an evening, and never on a morning, under a plea of the defendant's that the tenth meal was aſſigned to the parſon by law. They alledge, that they have duly ſet out to the plaintiff, for his Tithe, every fifth evening's milk, which they ſay is the tenth meal to which the parſon is entitled; they having brought their cows to the pail in the morning, and beginning to count from the morning of that day to the evening, and ſo on, the fifth evening's meal of milk makes the tenth meal, which is the parſon's due. The plaintiff contends, that the ſetting out every fifth evening's meal is not the due mode of Tithing; that the produce of the evening's meal, from phyſical as well as other cauſes, muſt always be leſs in quantity than the morning's meal; and the witneſſes on both ſides agree that the fact is ſo, though they differ a great deal as to the proportion. One of the plaintiff's witneſſes made a great number of experiments in order to aſcertain the proportion in which the evening's meal fell ſhort; and it appeared upon the reſult of theſe experiments, that it frequently fell ſhort a third, but never

never leſs than a fourth of the morning's. It therefore follows as a neceſſary conſequence, that a fifth evening's meal conſtantly ſet out to the parſon, muſt produce him upon the whole leſs than a tenth part of the milk."

This being the fact, the argument proceeds thus: the Tithe of milk (as of all other Tithable matters) belonging *de jure* to the parſon, is the tenth part of the milk produced. A rule of Tithing therefore, which neceſſarily gives to the parſon leſs than the tenth, cannot be the true rule. This was the ſum of the argument urged for the plaintiff. It was admitted, that it had been thus far ſettled, by the few caſes that are to be found on the ſubject of Tithe milk, that neither the tenth part of every cows milk at every meal, nor the tenth part of the whole meal, were to be ſet out to the parſon, and that the tenth meal was the Tithe to be ſet out. But for the plaintiff it was inſiſted, that the tenth meal muſt not be ſo computed, as neceſſarily to produce leſs than a tenth part of the whole ten meals taken together.

Upon general principles, we find it difficult to perſuade ourſelves that that can be a true rule of Tithing, which puts it in the

power of the parishioner to give the parson perhaps a twelfth, a thirteenth, or a fourteenth, instead of a tenth part. A prescription to pay less than a tenth, we all know, would be a void prescription, unless it were assisted by some consideration to make the parson amends for the difference between the tenth and that less which the prescription proposed to give him. When the tenth meal was declared to be the right of the parson, it was certainly substituted in the place of the tenth quart, or tenth dish, or the tenth part of each meal. It was not meant to give less than the tenth, but the object was to give the tenth in a more convenient and more useful form. It was therefore auxiliary to the general right of a tenth, which it was intended to fortify not to destroy that right. If, therefore, a construction can be put upon this rule of Tithing, which will preserve the original spirit of it, and put it out of the power of any man to make it an instrument of wrong and injustice, this court will strongly incline to adopt such a construction. And upon consideration, we think it may admit such a construction. The morning and evening meals being necessarily unequal in produce, may, and, we think, ought to be considered as distinct Tithable matters, from each of which you may count on the tenth,

which

which will be the right of the parſon; and that tenth will be the tenth meal of that deſcription to which it belongs, either morning or evening; and in this way the parſon will, upon the whole, have his full tenth, as much as he can have in the manner of collecting any other ſpecies of Tithes whatever; inſtead of neceſſarily taking leſs than a tenth in the defendants way of ſetting out his Tithes.

And in reſpect to authority, upon a careful review of all the caſes that we have been able to find upon this ſubject, we not only do not find any adjudged caſes ſtanding in our way, but we collect that the rule of the tenth meal was originally underſtood in the ſenſe in which it ought now to be underſtood. There appears therefore to us nothing, in point of argument or authority, which ſhould prevent us from effecting the juſtice of the caſe between theſe parties, by declaring that the defendants ought to have paid to the plaintiff the tenth morning's meal, and the tenth evening's meal of this milk; in which having failed, they will be decreed to account.

The coſts in this cauſe remain to be conſidered. Hitherto we have conſidered the caſe in the abſtract, for the ſake of the dry

dry point, detached from every circumſtance of fact, the ſingle fact of inequality in the morning's and evening's milk only excepted, upon which the whole ariſes. But upon the queſtion of coſts, the hiſtory of the cauſe and the general complexion of it becomes material. I think both may be collected from the evidence of one of the witneſſes; who has told us, that he entered into two engagements with a noble lord, to adviſe his tenants, and aſſiſt them in ſetting out their Tithes; that one of the defendants by name, and eight others, delivered a notice, in writing, to the plaintiff that they would ſet out their Tithe milk every fifth day in the afternoon, and that the next meal would be due on the twenty-fifth day of *April* next; and the milk was accordingly ſet out every fifth evening.

The purpoſe of ſetting out the Tithe in the evening, and of ſo many different perſons ſetting out their Tithes on the ſame evening, is too obvious to be miſtaken. The witneſs gravely tells us, that he was ordered to charge the tenants to play no tricks. Taking advantage of what he underſtood to be the letter of the law, to injure the parſon materially in his right, as well as to diſtreſs him as much as poſſible in the exerciſe of that right, I ſuppoſe this

gentleman

gentleman thought was no trick. But we are of opinion that this was a trick, diſgraceful to the adviſer of it, and reflecting no honour upon any one of the parties concerned in, or conſenting to it.

Dr. *Boſworth* feeling himſelf aggrieved by theſe manouvres, has taken upon him to controvert this point of law; and he has ſucceeded under theſe circumſtances, that though the point of law might have been thought ſufficiently diſputable, if it had been fairly conteſted, to have excuſed the party failing from paying the coſts of this ſuit; yet in this caſe we are of opinion, the coſts ought to follow the right. The defendants therefore are to account for the Tithe of milk with coſts."

The defendants conceiving the decree to be erroneous, appealed to the houſe of lords; where the decree, on the ſecond of *February*, 1779, was affirmed.

From the before-mentioned caſes it appears, that the regular way of paying the Tithe of milk is by ſetting out every tenth morning and evening's meal, in clean veſſels belonging to the owner of the milk, and leaving the ſame therein until the veſſels are again wanted by the owner; and if

not fetched away by the parſon prior to that time he is at liberty to throw it on the ground; and in the intermediate time the owner is not anſwerable for any accident which may happen to it.

The parſon or other proprietor of the Tithes, being, as before obſerved, intitled to the Tithe of wool; which is a mixt Tithe.

By a conſtitution of Archbiſhop Winchelſea; Tithes of Wool ſhall be paid to the incumbent, in whoſe pariſh the ſheep have remained conſtantly from the time of ſhearing until martinmaſs, though they be afterwards removed; and, if they be removed within ſaid time from pariſh to pariſh, each incumbent in whoſe pariſh they ſhall remain at leaſt thirty days ſhall have his proportion of the wool, but if they be removed from pariſh to pariſh after the ſaid time, (that is, from martinmaſs to the time of ſhearing) a reaſonable agiſtment ſhall be paid by the owners, for the time they ſtay.

And by another of the ſaid conſtitutions, it was ordained, that if foreign ſheep ſhall be ſhorn in any pariſh, the Tithe ſhall be there delivered to the rector of the church, unleſs he can be ſufficiently informed, that

ſatisfaction

ſatisfaction hath not been made for Tithe elſewhere, ſo as lawfully to hinder the payment thereof in ſuch pariſh where they are ſhorn.

Lind. 197.
Godo 438.

The law at this time differs materially from the two laſt mentioned conſtitutions, for it ſays, that Tithe of wool ſhall be paid only in the pariſh where the ſheep are ſhorn; and an agiſtment Tithe in the other pariſhes where they have been depaſtured; otherwiſe it might be very inconvenient to proportion and divide the wool; eſpecially where the pariſhes ſhall (as it may often happen) be at a great diſtance; and where the owner of the ſheep had depaſtured them in the pariſh, from Michaelmas to Lady-day, and then ſold them; upon ſuit in the ſpiritual court, for a tenth of the bargain the owner to obtain a prohibition ſurmiſed, that he could pay a tenth of the wool, according to the cuſtom of the pariſh: But a prohibition was denied, becauſe the parſon was defrauded of all, if he is not permitted now to have his recompence. For it was not the time of ſhearing when they were ſold, and the ſheep are now gone into another pariſh. And *Whitlocke* (juſtice) ſaid, that *de animalibus inutilibus*, the parſon ſhall have the tenth part of the bargain for depaſturing them, as horſes, oxen, *&c.* But *de animali-*

bus utilibus, as cows, ſheep, *&c.* he ſhall have the Tithe in ſpecie.

See infra agiſtment.

If the ſheep be carried away unneceſſarily and but a little before ſhearing time, this is fraudulent, and the Tithes ſhall be paid in ſuch caſe, in that pariſh from whence they were fraudulently removed.

But if they are removed without fraud, it is held in equity, that no part of the Tithe of wool will be payable in that pariſh from whence they were removed; but an agiſtment Tithe muſt be paid for them, as for cattle yielding no profit to the incumbent there; and that theſe Tithes are in no caſe to be divided; but the whole to be paid where they are ſhorn, and an agiſtment Tithe for them as unprofitable cattle, in every other pariſh where they have been depaſtured. And no diſtinction is made, whether they have continued for leſs than thirty days; for there is the ſame equity that Tithes ſhall be paid for one day as for thirty.

Neither can it be objected, that in ſuch caſe the ſheep pays two Tithes in one year. For if the Tithe of agiſtment was not paid, the parſon or other proprietor of the Tithes, where the ſheep were depaſtured, would

would be without recompence for the paſture of the ſheep.

If a pariſhioner pays Tithe of lambs at Marktide, and at Midſummer following doth ſhear the reſidue of his lambs, *viz.* the nine other parts, he ought to pay Tithes of their wool alſo; although there is not above two months betwixt the time of the payment of the Tithes of the lambs which were Tithed with their fleeces, and the ſhearing of the reſidue, for this is a new increaſe, and a prohibition was denied accordingly. 1 Roll. 642.

And in the caſe of *Baker* and *Sweet*, *M.* 1721, it ſeemed to be admitted, that wool of lambs ſhould pay Tithes, although the lambs had paid Tithes two months before. Bunb. 90.

And in the caſe of *Carthew* v. *Edwards*, *T*, 1749. The plaintiff brought his bill (*int. al.*) for the Tithe of the wool of lambs. The defendant anſwered, that he apprehended no Tithe of lamb's wool to be due, the plaintiff having received the full Tithe of the lambs in their wool. But by the court it was declared, that the Tithe of the wool of lambs was due to the plaintiff, and decreed accordingly.

From the above deciſions it may be ſurmiſed, that where a *modus* is paid for Tithe lamb, and the other nine lambs are ſhorn, Tithes ſhall be paid of their wool, for wool and lamb are different ſpecies of Tithes, and therefore a *modus* for lambs, is no ſatisfaction for the Tithes of wool.

By 2 *Inſt.* 652, and *God.* 645. No Tithe ſhall be paid of locks of wool, if it appear that they were caſually loſt; but otherwiſe if by contrivance and fraud.

Where the cuſtom is to ſhear the necks of ſheep about Michaelmas to prevent the tearing of the ſame by thorns and briars in the winter; if this be done without fraud, and not to deceive the parſon, then no Tithes ſhall be paid thereof.

1 Roll Abr. 64. 6

If ſheep be ſhorn and die of the rot or other diſeaſe before the Eaſter following, their wool is not Tithable, unleſs the parſon can preſcribe to have it. But by *Dodderidge* and *Jones*, if a man's ſheep die of the rot or other diſeaſe, or the owner kills or ſells them, he muſt pay Tithe for the wool rateably. If a man kills his ſheep, he ſhall pay Tithe for their wool, but not for the pelts or ſkins.

F. N. B. Conſult. 51. 1 Roll Abr. 641. Z. 18. Latch 254.

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In the caſe of *Brinklow* v *Edmunds*, *M.* 1731, an halfpenny payable on the ſhearing day, for the wool of each ſheep dying between Candlemaſs and ſhearing day, was admitted and eſtabliſhed as a good *modus*. Bunb. 307.

In the caſe of *Wilſon* and the Biſhop of *Carliſle*, *T.* 13, *Jac.* *Wilſon* brought a prohibition againſt the biſhop, who held the living of Grayſtock, in *commendam*; and ſaid, that there was within the pariſh of Grayſtock this cuſtom for Tithing wool, that if any inhabitant have five fleeces of wool or above, he ſhall after the ſhearing and binding up of the ſame without fraud or deceit, pay to the rector (after notice given) the tenth part thereof, at the door of the manſion houſe of ſuch perſon, inhabiting within the ſaid pariſh, without ſight or touch of the nine parts by the rector or his agent; and that the parſons have ſo accepted it.

To this the biſhop demurred in law. And it was adjudged for the biſhop with one conſent. For the ſubſtance of the preſcription is laid, that the very true tenth is and ought to be paid without fraud; which is not preſcriptible for it is common right. Then the ſole point preſcriptible is, that this is without view or touch of the nine

parts; which is, in effect, repugnant to the other: for when you have laid the tenth in the former part, you lay the way to fraud in the latter. For it is againſt common reaſon, that any ſhould judge or divide for himſelf, and then take choice of his own diviſion, againſt the rule laid down by *Littleton*; for the truth of the tenth depends on the proportion it holds with the nine parts; and therefore for the pariſhoner to ſet out a part for the tenth, which he only affirms to be juſt, is to give him power to Tithe as he liſts; and the preſcrition were as reaſonable as to ſay plainly, that they might ſet out what Tithe they pleaſed. And it is a weak anſwer to ſay, that if it be not a juſt tenth, he may refuſe it, and ſue for his due. For he hath no means to be aſſured whether it be true or not, ſo his ſuit may be cauſeleſs, ſure he may be, it will be fruitleſs. The law was provided, not to cauſe, but to prevent ſuits; and therefore provides, that things be done by indifferent means and perſons, that there be no juſt ſuſpicion of indirect dealing. Hob. 107.

So in the caſe of *Chriſtian* v. *Wren*, and others *M.* 1732, on a bill by the vicar of *Croſthwaite* in the county of *Cumberland*, for Tithes, the defendants inſiſted on a cuſtomary manner of payment of Tithe wool

wool of the elder ſheep, by weighing the wool, and delivering the tenth part without fraud to the vicar, without his ſeeing or touching it. The defendants alſo inſiſted, that they ought to pay no Tithe of hog wool (that is, the wool of ſheep of a year old); alledging that no Tithe thereof had ever been paid: that the tenth lamb having been paid (or a compoſition for the ſame) the other nine ſhould not pay Tithe of their wool that ſame year; and, inſiſting further that a *modus being* paid for the Tithe lambs, the ſaid *modus* included alſo the Tithes of the hog wool. But the evidence not coming up to the proof of its being included within the *modus*, and the other allegations being plainly ſetting up a *non decimando*; the cuſtom was over ruled on the authority of the aforeſaid caſe in Hobart and it was decreed that the Tithes of the hog wool ſhould be paid as well as of all the other wool. Bunb. 301.

If a preſcription be, that if the owner hath under the number of ten fleeces of wool, he ſhall pay one penny to the parſon for the Tithe of each of them; and if he hath more, that then he ſhall deliver to the parſon, the tenth part of his wool upon his conſcience, without fraud or covin, *ſine viſu vel tactu* of the parſon, the nine parts. This is not a good *modus*, for that it is unreaſonable, and

and is in effect to give the parſon no more than the pariſhoner pleaſed.

Roll. Abr. 648.

So if a preſcription be, to pay every tenth pound of wool for the Tithes of the wool, and it is not ſhewed what he is to pay, if the wool doth not amount to ten pounds, this is not good; for that it is a preſcription in *non decimando*, if it be under ten pounds.

Roll. Abr. 648.

If a pariſhioner preſcribes, that in conſideration he had time out of mind paid Tithe wool of all ſheep that he ſheared viz. as well of thoſe which he bought but two days before the ſhearing, as of others that he had kept all the year, he had uſed to be diſcharged of the Tithe wool of all ſheep that he ſold two days before the ſhearing, this is a good preſcription, becauſe by the (ſpiritual) law, whole Tithe wool of the ſheep nouriſhed in another pariſh, and ſo lately bought before that ſhearing, is not due to ſuch parſon.

Roll. Abr. 468.

But a cuſtom to pay Tithes in land for ſheep, if they continue in the pariſh all the year; and if they be ſold before ſhearing time, but a half-penny for every one ſo ſold, was held an unreaſonable cuſtom; for by ſuch

ſuch means the parſon may be defeated of his Tithes. March Caſe. 28.

If ſeveral mens ſheep do paſture together in one flock or under one Shepherd; yet yet this ſhall not make them to be Tithed together, but every owner ſhall pay his Tithe of them by himſelf: but if the head of a family, hath his flock mixed with his children's ſheep, which are under his tuition, and he takes the profit of them to his uſe, in that caſe they ſhall be Tithed together. Lind. 139. Dez. p. 2. C. 6.

It may be here obſerved, that the meaſure of right in the eccleſiaſtical courts, by the canons, and in the courts of equity, by the rules of equity (without much regard to the canons), is very different which may cauſe confuſion in theſe reſpects. In the former caſe, the laſt reſort is to the delegates; in the latter, to the Houſe of Lords.

The Tithes not only of ſuch cattle, which yield a Tithe in hand are to be paid; but alſo for the depaſturing ſuch as are barren ſtock, as for horſes, oxen, bullocks, &c. which is called an agiſtment Tithe: And the Tithe of agiſtment is the tenth part of the value of the keeping or depaſturing of ſuch cattle as are liable to pay it. And it

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is ſo called from the French *geyſer*, *giſter*, *(jacere)* to lie; becauſe the beaſts are *levant* and *couchant*, during the time they are on the land.

And the parſon, vicar, or other proprietor of the Tithes, is entitled to this Tithe *de jure*; becauſe the graſs which is eat is of common right Tithable, and muſt have paid Tithe if cut when full grown.

Lord Raym. 137. 2 Salk. 655, 2 Inſt. 651.

The general rule (which may be taken from the deciſions on this ſubject) is that this Tithe is to be paid for beaſts agiſted for hire; or for dry or barren cattle, that do otherwiſe yield no profit to the parſon: and not for cattle which are nouriſhed for the plough or pail, and ſo employed in the ſame pariſh; becauſe the parſon hath Tithe for them in another kind, namely by the produce of their labour or the Tithe of their milk.

Deg. p. 2. c. 5.

But if a foreigner that lives in another pariſh, depaſtures ground with cattle bred for the plough or pail, to be employed in a foreign pariſh he ſhall pay Tithe for the agiſtment of ſuch cattle.

Deg. p. 2. c. 5. Lord Raym. 129.

And in the caſe of *Swales* v. *Lowther*, he had a houſe and a great farm of arable land in

in the pariſh of *Kippax*, where he dwelt, and also five acres of ploughed land, and forty acres of paſture in *Swillington*, upon which paſture he fed his cattle, which were employed in huſbandry, in the pariſh of *Kippax*. 5 Mod. 96. 97.

The parſon of *Swillington* libelled for Tithes of the agiſtment of cattle there, and thereupon the defendant ſuggeſted, that by the cuſtom of England, no Tithes ought to be paid for the agiſtment of cattle kept for the plough or pail.

And a prohibition was moved for on the ground, that the plaintiff cannot libel for the agiſtment of cattle, but only for ſuch as are fed in the ſame pariſh and not elſewhere, and that the paſturage of cattle uſed for huſbandry in the ſame pariſh, is not Tithable, becauſe the parſon has Tithes for them in another kind.

On the other ſide it was ſaid, that the parſon is to have profit wherever the pariſhioner hath any benefit, and that he is an inhabitant wherever he hath land. The court would not grant a prohibition upon the firſt motion, but gave the defendant leave to amend by adding that he had arable land in *Swillington*, and did exerciſe huſbandry

dry there. And it was ſo amended. And upon another application being made to the court in the *Michaelmas* term following, the court were then of opinion: That if the cattle depaſtured, were not for ploughing the land in the ſame pariſh where they are fed, he ſhall pay Tithes though they plough in another pariſh; and if he had more cattle than he employed for the plough in the ſame pariſh he ought to pay Tithes for them.

If after milch cows are grown old or otherwiſe, they be kept dry and depaſtured as other dry cattle, though but for one month, a Tithe ſhall be paid for them.

Hetl. 100.

Alſo if the ſame cattle are turned off to be fatted, and are grazed, their Tithes of agiſtment ſhall be paid: ſince they are no way beneficial to the parſon in any other Tithes.

Ibid.
Gibs, 676.

There was formerly a doubt, whether cattle for the plough, pail or ſaddle ſhould be accounted Tithe free, without a ſurmiſe or ſome cuſtom for it? And *Richardſon* in *Thornhill's* caſe in *Hitley*, held that a ſurmiſe (of a cuſtom) ought to be made, and that he had ſearched the books and book of entires

entires, and found that ſome ſurmiſe is always made.

But *Croke* replied, that in the king's bench, he had twenty times ſeen prohibitions granted in ſuch caſes, without any ſurmiſe, that is, to ſuits in the ſpiritual court for Tithes of ſaddle horſes, and young cattle kept for plough or pail. Hetl. 94.

And in a caſe in *Bunb.* 3, ſaddle horſes ſhall pay no Tithes, nor cattle for the plough or pail, or cattle killed for the uſe of a man's own family. 1 Roll Abr. 641.

And houſes that are kept for the uſe of huſbandry ſhall pay no Tithe but if they are kept for ſale, to let out to hire, to carry coals, or to any other employment whereby the owner receives an emolument, and from which the parſon has no benefit, Tithe ſhall be paid to them. Hetl. 93. 94. Gibs, 676.

And if an innkeeper doth agiſt the horſes of travellers or ſtrangers on his lands, he ſhall pay Tithes for them; for otherwiſe it is ſaid, the owner of the land would make a profit of his land, and yet defeat the parſon of all the Tithe thereof. Hard. 35. Gibs, 682.

And the occupier of land is not only to pay

pay for his own ſtock depaſtured upon his land, but alſo for the ſtock of other perſons thereon fed or maintained.

3 Cro. 475.

Yet if any man having lands in a pariſh ſhall rent out his lands, reſerving the running of his ſaddle horſe therein, no Tithes ſhall be paid of the graſs he eats; by *Montague*, *Croke* and *Dodderidge*; contra *Houghton*, who held that for all barren beaſts Tithes ſhall be paid, except for ſuch as be for huſbandry.

1 Roll. Abr. 641.

And the court of exchequer were nearly of Mr Juſtice *Houghton's* opinion in the caſe of *Thorp*, v. *Bendlowes*, *T.* 1762. *Thorp* as rector of *Houghton*, in the county of *Durham*, filed his bill againſt *Bendlowes* (amongſt other things) for the Tithe of agiſtment of his coach horſes, ſuggeſting that the horſes were not kept for pleaſure only, but that the defendant made a profit of them, by employing them to fetch his coals at ten miles diſtance out of the pariſh. Which fact was proved in the cauſe. The defendant by his anſwer inſiſted, that the horſes were kept for his coach and for pleaſure only, and were not liable to pay any Tithe for agiſtment as barren and unprofitable cattle.

The

The court were unanimouſly of opinion that coach horſes were liable to pay Tithe of agiſtment, and decreed the defendant to account for the ſame, and to pay the plaintiff his coſts.

And Juſtice *Houghton's* ſeems the better opinion, for, in whatever ſituation the land may be, the parſon or other proprietor of the Tythe, would clearly receive a benefit from it, either as arable, meadow, or paſture land, *&c.* except in the caſe of a ſaddle horſe or other beaſt of pleaſure being agiſted upon it, and then the clergyman is to be ouſted of his Tithe becauſe the owner of the horſe or horſes, *&c.* (for there is no limitation as to the number) can afford to keep that ground as pleaſure ground, which his poorer neighbours are obliged to uſe in the way of agriculture.

And to be diſcharged from the payment of Tithes of a horſe, *&c.* it muſt be averred and proved, that the horſe is uſed for labour, (whereby the parſon receives a benefit), or kept for pleaſure as for hunting, *&c.* Poph. 126. 1 Roll. Abr. 647.

And in the caſe of *Pothill*, v. *Mary*, *A* being parſon of *D* libelled in the ſpiritual court againſt *B*, (*int. al.*) for the herbage of depaſturing his geldings, who there ſhewed,

that they were his hackney geldings, which he kept for his pleaſure, and for himſelf and his ſervants to ride upon, being his ſaddle horſes; and this plea being there refuſed, he therefore prayed a prohibition.

And the whole court were clear of opinion, that here was good cauſe for a prohibition, for that theſe horſes are not Tithable, neither is any Tithe herbage to be paid for them: But it would be otherwiſe if employed in labour for gain, or bought (or bred) for ſale; for of theſe he ought to anſwer to the parſon for their herbage, but not for the herbage of his geldings, by him kept and uſed only for his pleaſure. But had it been for working or for cattle bought and fatted to ſell again, then allowance is to be made for their herbage, becauſe a profit does come in by them. But the caſe is otherwiſe of ſaddle horſes; and the whole court agreed, that a prohibition ſhould go.

And it is ſaid in Roll. Abr. 641. that if Tithes are paid in kind of lambs fleeces, and other things, going and ariſing upon his paſtures, waſtes or other lands, Tithes ſhall not afterwards be paid (in the ſame year) of agiſtment for the ſame paſtures waſte and other lands.

But

But in the caſe of *Coleman* impropriator of *Thompſon*, in *Norfolk*, againſt *Barker*. The plaintiff by his bill demanded Tithes for the depaſturing of ſheep on turnips, remaining on the ground unſevered. The defendant ſaid that the ſheep paid Tithes of wool, and that Tithes ought not to be paid twice.

It appeared that after ſhearing time the defendant fed his ſheep with turnips, whereby they were bettered five ſhillings each ſheep; that they went about five months on the turnips, and then were ſold to the butcher; and the defendant brought in a new quantity of ſheep, before ſhearing time came again, ſo that the plaintiff always had Tithe of wool of the full number.

On behalf of the plaintiff it was inſiſted that this was a new increaſe, and conſequently that Tithes ought to be paid for the improvement and increaſe, and if the turnips had been ſevered, there had been no doubt but Tithes had been due, and ſeveral caſes were cited for the plaintiff. *Nicholas* and *Hooper*, *Eaſtmond* and *Sandys*, but the caſe principally relied on was a decree in the court of Exchequer, *H.* 1. *W.* & *M.* *Dummer* and *Wingfield*, which was a demand of Tithe for paſturage of ſheep, from the

1 Roll Abr. 462. pl. 7. Show. Ca. Parl. 192.

time of ſhearing until they were ſold. The defendant inſiſted that by ſheep depaſturing on the land it was improved, and the plaintiff's Tithes bettered thereby; but the court decreed an account, and ſaid this was no bar to the plaintiff's demand; and this decree, upon rehearing was affirmed.

It was argued for the defendant that this would be double Tithing, which was contrary to the whole tenor of the law, and cited many caſes for that purpoſe.

But the Court agreed that this was a new increaſe, that they would not diſtinguiſh it from the caſe of *Dummer* and *Wingfield*, that the diſtinctions laid down in the caſe of *Eaſtmond* and *Sandys* were good, and decreed that the defendant ſhould account for the depaſturing of the ſheep.

Gilb. Eq. Rep. 231.

And the like was decreed in the caſe of *Swinfen*, v. *Digby*, *H.* 1731. for in ſuch caſe, the ſheep being turned off to be fatted, ceaſe to be profitable to the parſon in any other way.

Bunb. 314.

And it is the ſame in ſeveral of the old authorities, for in *Moor.* 909. *Cro.* 475. and *Hetl.* 85. it is ſaid that after a man hath paid the tenth colt, calf, or lamb, if he rears

rears any of the reſt, and ſells them before they yield profit to the parſon, or be uſed for the plough, he ſhall pay Tithe of them.

But if a man buys or breeds beaſts and feeds them, and ſpends them in his houſe, he ſhall not pay any Tithes for them. 1 Roll. Abr. 647. Moor. 909 Goldſbo. 174. 3. Cro. 446.

So if he having paid Tithes of his colts or calves, doth rear any of the reſt, or buys others to till his land in the ſame pariſh; or doth rear cow calves to bear calves, or for the dairy, no Tithes ſhall be paid for the paſture that they eat in the mean time. Hetl. 85. 1 Rol. Abr. 846. 2. Bulſt. 238. 1 Roll. Rep 38. Moor. 909 3. Cro. 702. 2. Brownl. 30.

And for the better aſcertaining the payment of Tithes of cattle fed or depaſtured on large waſtes or commons, where the limits and bounds of pariſhes are not well known, and which waſtes and commons may lie within ſeveral pariſhes, it is enacted by the *Stat* 2, and 3, *Ed.* 6. *c.* 13. *s.* 3. That all and every perſon who hath or ſhall have any beaſts or other cattle Tithable going, feeding, or depaſturing in any waſte or common ground, whereof the pariſh is not certainly known, ſhall pay their Tithes for the increaſe of the ſaid cattle ſo going in the ſaid waſte or common, to the parſon,

vicar, proprietor, portionary, owner, or other their fermors or deputies of the pariſh, hamlet, town, or other place where the owner of the ſaid cattle inhabiteth or dwelleth.

This ſtatute muſt very often give way to the cuſtom of the place, for if by preſcription, time out of mind, the Tithes of cattle depaſtured and kept upon any ſuch waſte or common, where it is not known within what pariſh the ſaid waſte or common lies, hath been paid to the parſon of any pariſh, *&c.* ſuch cuſtom or preſcription ſhall not be taken away, by the ſaid clauſe. But the Tithes ſhall be paid to ſuch parſon, *&c.* according to ſuch preſcription.

Savil 60.

There is a peculiar difficulty attending this Tithe, that it cannot be taken in kind. For being no otherwiſe cut or ſevered than by the mouth of the animal, together with the other nine parts, and conſumed at the ſame time, the perſon to whom it is due can only receive the value of it.

Cuſtom in the payment of this Tithe is the principal rule to go by, and the old deciſions on this ſubject vary ſo much that it would be difficult to obtain a general inference from them.

In

In *Popham* 197, it is ſaid that if there be no cuſtom in the place, which muſt be obſerved, then the tenth of the money to be received by agiſtment, is to be paid to the parſon. Hard. 184.

And by *Hale*, chief baron, Tithes of barren cattle are *de communi jure* according to the yearly value of the land, after the rate of two ſhillings in the pound per ann. for that they cannot otherwiſe be valued or accounted for, becauſe the profits of the lands, for which they are paid, are perceived by the mouths of the beaſts.

But neither of the deciſions ſeem to be law at this day; for in the caſe of *Willis* v. *Harvey* and others, *M.* 9. *G.* 3.---Plaintiff was vicar of the pariſh of *Holbeach*, *per cur.* The mode of payment of the Tithe of agiſtment muſt be thus: the farmer breeds an ox, and at three years old ſells him to a grazier for ſeven pounds; according to the abovementioned caſe he would be entitled to fourteen ſhillings, but it ſhall appear that he is not, for, upon the ſame principle he would be entitled to a tenth part of the carcaſe of the cattle if the perſon had killed him; whereas he could have no ſuch right, his claim being founded excluſively on the tenth of the produce conſumed by the ani-

mal. And when the ox is in the hands of the grazier, a ſecond Tithe ariſes, probably to another parſon in another pariſh; he keeps him twenty weeks, and then ſells him to the butcher for ten guineas; the improved value is three pounds ten ſhillings, but the parſon ſhall not be entitled to ſeven ſhillings for his agiſtment Tithe; for then he would avail himſelf of the ſkill, addreſs, and judgment of the grazier, who, for ought he knows, may have over-reached the butcher, and ſold the animal for more than he will yield; it is the tenth of the price of keeping him twenty weeks that he may claim, which amounting to forty ſhillings, leaves him four. And ſo it is with reſpect to colts, and other animals coming under this denomination.

Burn ſeems to be of this opinion; for he ſays, "That the way of valuation, according to the pound-rent of land, cannot be any certain rule, eſpecially where profitable and unprofitable cattle are depaſtured together; it being impoſſible in ſuch caſe to adjuſt or aſcertain how much of ſuch rate the unprofitable ſhall pay. But in all caſes, the Tithe of agiſtment of barren and unprofitable cattle is to be paid according to the value of the keeping of each per week. And the value of the keeping

3 B. E. L. 448.

keeping of a ſheep, beaſt, or horſe, upon any particular lands, is as eaſily aſcertained from the uſual prices given for the depaſture of ſuch ſheep, beaſts, and horſes per week each, in that pariſh or neighbourhood, where profitable cattle are kept at the ſame time, upon the ſame lands together with them, or not.

It often happens that Tithes are paid of the ſame lands ſeveral times in the ſame year. As, ſuppoſe an occupier of land mows his land, and pays Tithe in kind of hay; he afterwards turns beaſts upon the eddiſh or after-graſs. After the eddiſh is conſumed and eaten up by theſe beaſts, other barren and uprofitable cattle are put and kept upon the ſame land during the winter; others again for the ſpring eatage, which muſt pay the Tithe of their agiſtment, during the time they have been ſo kept on that ground, according to the value of the keeping of every ſuch beaſt or horſe per week. So that here the land pays three or four different Tithes in the ſame year, which is contrary to the doctrine generally delivered in the old books, that the ſame lands ſhall not pay Tithes twice in the ſame year.

Upon

Moor. 454, 909. 1 Roll. Abr. 651. 3 Cro. 449, 475. Gold. 147.

Upon a ſuit for Tithes of dry cattle, to have a prohibiton, the ſurmiſe was, that he uſed to pay the tenth ſheaf of corn, the tenth cock of hay, the tenth fleece of wool, the ſeventh calf, the parſon to pay three halfpence, and the eighth calf, if he had eight, and the parſon to pay a penny, and ſo to ten; and if had under ſeven, to pay only a halfpenny for every one; and after the ſame rate for lambs and colts; and that this was in ſatisfaction for the Tithes of dry cattle, and for all other Tithes of corn, hay, and cattle.

And the opinion of the whole court was, that this ſurmiſe was not ſufficient; for that which he uſed to pay is but the Tithe in kind, and therefore cannot be in ſatisfaction for the Tithes of other things than themſelves.

And in the caſe of the Archbiſhop of *York* v. the Duke of *Newcaſtle*, it was determined that payment of Tithes of one ſpecies cannot be a good *modus* for all Tithes.

2 Salk. 657.

In the caſe of *Smith* and *Rodcliff*, *H.* 1717, the barons were of opinion, that a *modus* of one ſhilling in the pound for paſture, according to the value of the rent, was a void *modus*.

Bunb. 20. id. 174.

And

And the like was adjudged in the caſe of *Harriſon* and *Sharp*, *T.* 1724.

The Tithes for depaſturing unprofitable cattle ought to be paid by the occupier of the ground, and not by the owner of the cattle. Bunb. 3. Hard. 184.

In the caſe of *Hicks* v. *Woodſon*, *H.* 8. *W.* 3. *B. R.*---In attachment on prohibition, the plaintiff declared of a cuſtom in ſuch a hundred to pay no Tithe for agiſtment of cattle barren. Iſſue was taken upon the cuſtom, and found for the plaintiff, but judgment was arreſted. 2 Salk. 656.

And by the Court;---Tithe of agiſtment is due of common right, becauſe the graſs, *&c.* which is eaten, is *de jure* Tithable, and muſt have paid Tithe if cut in perfection; and the court took this difference, *viz.*

That a hundred or a county cannot preſcribe in a *non decimando*, for a thing that is in its nature *de jure* Tithable; for as no one ſingle perſon or his eſtate can, no more, by the ſame reaſon, can the hundred which conſiſts but of many ſingle perſons eſtates. March 26. 1 Roll. Abr. 653.

But

But of things which in their nature are not Tithable *de jure*, a hundred or county may preſcribe in a *non decimando*, becauſe they are diſcharged in ſuch caſe without a cuſtom to the contrary, and they do but inſiſt on their ancient right, and that cuſtom hath not prevailed againſt it.

Of all domeſtic fowls Tithes are to be paid: as, geeſe, hens, and ducks; and the manner of Tithing them is, either by paying the tenth egg or the tenth of their young, according to the cuſtom of the place, but not of both; for where Tithe of eggs is paid, there is no Tithe of the young; nor, *e converſo*, where the Tithe of young is paid, no Tithe of eggs.

Deg. p. 2. c. 11. God. 405. Rep. Chan. 405.

It is ſaid, that ſwans alſo, as being tame fowls, ſhall pay Tithe.

Deg. p. 2. c. 11. Watſ. c. 49.

The Tithes of geeſe, ducks, and ſwans are uſually paid in kind; for this reaſon, as I ſhould conceive, that it might be difficult to find their eggs; but of hens and turkies, are uſually paid in their eggs, but therein the cuſtom of the place muſt be obſerved.

Deg. p. 2. c. 11.

There

There was formerly a doubt whether turkies ought to be reckoned amongſt things that are *feræ naturæ*, and conſequently not Tithable, as in the caſe of *Houghton* v. *Prince*.

But this caſe has been controverted, and turkies declared to be Tithable in the caſe of *Carleton* v. *Brightwell*. In a bill for Tithes in kind *(int. al.)* the Tithes of turkies was demanded, and on the part of the defendant it was objected, that according to the above caſe of *Houghton* v. *Prince*, they were deemed *feræ naturæ*, and therefore not Tithable, and that turkies were not brought into this kingdom until Queen *Elizabeth*'s time.

Per Cur. it was declared that it doth not appear but that turkies are as tame birds as hens or other poultry, and therefore muſt pay Tithes, but if Tithes be once paid of the eggs, there can be no ſecond demand made with reſpect to the chickens hatched afterwards. 2 P. W. 402.

It hath been adjudged, that the paying thirty eggs in *Lent* is a good *modus* for all Tithes of eggs; which ſeemeth to croſs the rule of law that every *modus* ought to be ſomewhat, as to kind, different from the thing Gibſ. 679. Lord Raym. 358. Salk. 656.

thing that is due. But it is to be conſidered, that by this cuſtom the pariſhioner is bound to pay the thirty eggs, whether he has hens or not, ſo that he may be obliged to buy eggs to pay the preſcription; and this is what makes it a good cuſtom; but if the cuſtom had been, that he ſhould pay thirty eggs of his own hens, the cuſtom would have been void.

And when a prohibition was prayed to a ſuit for the feathers of old geeſe ſheared, and alſo of the young, ſuggeſting a *modus* of a young gooſe with the feathers, paid on the firſt day of *Auguſt*, yearly, in full of the Tithe of geeſe and feathers; it was granted accordingly; for that it was more than the pariſhioner was otherwiſe bound to do, to keep a gooſe feathered till the firſt of *Auguſt*.

3 Keb. 705.

As to the Tithes of deer, conies, hares, pheaſants, partridges, fiſh, *&c.* for which perſonal Tithes are due, the reader is referred to the following chapter.

CHAP.

CHAP. IV.

PERSONAL TITHES.

Their Definition, Nature, and Kinds; as of Mills at large; of Fiſhing, Fowling, and Hunting; of Creatures feræ naturæ, *as Deer, Conies, Pheaſants, Bees,* &c.

HAVING in the foregoing chapter treated ſomewhat largely of Tithes in general, and alſo of predial and mixt Tithes in particular, I ſhall now proceed to treat of ſuch as are called perſonal, and which are ſo called, *quia potius in reſpectu perſonæ ſolvuntur quam rei.* Deg. 338.

Theſe, as before obſerved, are the tenth part of the clear profits which ariſe by the honeſt labour, art, or induſtry of man, employing himſelf in ſome lawful artifice or negociation, as by following any trade or occupation, as carpenter, ſmith, maſon, butcher; or by buying and ſelling, as merchant, retailer, grocer, druggiſt, and the like; or of fiſhing, fowling, hunting, &c. 2 Inſt. 621, 657, 649. Roll. Abr. 656.

if

if ſuch employments are uſed for gain, and not for pleaſure only.

And by the canon law, every one who uſes buying and ſelling, *&c.* ought to pay for a perſonal Tithe a tenth part of all his clear gains, deducting his charges and expences. And it ſeems that this was the general cuſtom at the time of making the 9 Ed. 2. c. 1. ſtat. *Articuli cleri.*

But the law then was, and ſtill is, that if a man buys goods, wares, or merchandizes, and do not ſell them to profit, or if he gives them or makes uſe of them for himſelf or family, there is no Tithe to be paid, for there is no gain made. Deg. p. 2. c. 22.

Perſonal Tithes are *(int. al.)* directed to be paid by the ſtatutes of *Art. cleri.* 27. *H.* 8. *c.* 20. 32. *H.* 8. *c.* 7. *ſ.* 1.; but the ſtatute which confirmed theſe, and more particularly directs the payment of perſonal Tithes, is the 2d and 3d *Edw.* 6. whereby it is enacted, " That every perſon exerciſ-
" ing merchandiſes, bargaining and ſelling,
" clothing, handicraft, or other art or
" faculty, being ſuch kind of perſons, and
" in ſuch places as heretofore, within theſe
" forty years, have accuſtomably uſed to
" pay ſuch perſonal Tithes, or of right
" ought

" ought to pay (other than ſuch as are " common day-labourers) ſhall yearly, at " or before the *Feaſt* of *Eaſter*, pay for his " perſonal Tithes the tenth part of his " clear gains, his charges and expences, " according to his eſtate, condition, or de- " gree, to be therein abated, allowed, and " deducted.

" Provided always, that in all ſuch " places where handicraftſmen have uſed " to pay their Tithes within theſe forty " years, the ſame cuſtom of payment of " Tithes to be obſerved, and to continue; " any thing in this act to the contrary not- " withſtanding.

" And alſo, that if any perſon refuſe to " pay his perſonal Tithes in form afore- " ſaid, that then it ſhall be lawful to the " ordinary of the ſame dioceſe where the " party that ſo ought to pay the ſaid Tithes " is dwelling, to call the ſame party be- " fore him, and by his diſcretion to exa- " mine him by all lawful and reaſonable " means, other than by the party's own " corporal oath, concerning the true pay- " ment of the ſaid perſonal Tithes."

This act of parliament, Sir *Simon Degge* ſays, reſtrains the canon law in two things;

firſt, where the canon was general, that all perſons, in all places, ſhould pay their perſonal Tithes, the act reſtrains it to ſuch kinds of perſons only as have accuſtomably uſed to pay the ſame within forty years before the making of the act.

Secondly, whereas by the eccleſiaſtical laws they might, before this act, have examined the party upon his oath concerning his gain, this act reſtrains that courſe, ſo that the party cannot be examined upon oath; and by this act the day-labourer is freed of the payment of his perſonal Tithes.

Deg. 340. Nor can it be intended upon that ſtatute, that although ſuch perſonal Tithes have been ſometimes paid within forty years paſt, that therefore they are due by virtue thereof; but as the act itſelf ſays, that muſt have been accuſtomably, that is, conſtantly paid for forty years next before the act made.

And it has alſo been adjudged, that ſervants of the plough ſhall not pay any Tithes of their wages; and a prohibition was granted accordingly, although the libel was only for a third part of their wages; leaving the reſidue to be free. For as it is ſaid that beaſts of the plough ſhall be free from Tithes,

Tithes, by the ſame reaſon the ſervants that attend the plough ſhall be alſo free. 1 Roll. Abr. 646.

Neither are the gains of an innkeeper within that act, for in the caſe of *Dolley* v. *Davies*, the parſon libelled in the ſpiritual court againſt an innkeeper, to have the Tithes of the profit made by him of his kitchen, ſtable, and cellar, and laid particularly that he made great gain in ſelling his beer, having bought it for 500l. and ſold it for 1000l. and that *negotiando et traficando* he had gained 300l. of which he ought to have Tithe. But upon motion a prohibition was granted. 2 Bulſt. 141.

It hath been reſolved, that ſervants in huſbandry ſhall not pay any perſonal Tithe. 1 Roll. 646.

The payment of perſonal Tithes muſt depend upon the cuſtom of the plaee where payable, or on the ſeveral ſtatutes made reſpecting the ſame.

Lord *Coke*, in his ſecond inſtitutes, ſays, that it was never judicially determined that he knew of, whether any Tithes were due for corn-mills, but for fulling-mills it has been held that none are due, and the Tithes of mills are perſonal. 2 Inſt. 622.

3 Bulſt. 212. 1 Roll. Rep. 405. S. C.

It was alſo ſaid by him, when chief juſtice, that no perſonal Tithes, by the ſtat. *Ed.* 6. were to be paid for mills, but only where by ſpecial uſage the ſame had been accuſtomably paid; to which the court agreed.

So, when a ſuit was in the ſpiritual court for the Tithes of a fulling-mill, ſuggeſting that the defendant did full with his mill forty cloths per week, and did gain by each cloth two ſhillings, whereof he demanded Tithes; a prohibition was granted upon this ſurmiſe only; that by the law of the land he ought not to demand Tithes of ſuch mills. For, *per cur.* Tithes are not payable of ſuch things whereof the gain comes by the labour of men, without cuſtom.

2 Cro. 523.

This caſe was ſo adjudged, *Hill.* 16. *Jac.* 1. *B. R.* and the reſolution ſeems to be founded upon the expreſs words of the ſaid ſtatute, *i. e.* "accuſtomably uſed to pay." And yet in *Mich.* 11. *Car.* 1. in the ſame court, it was held, that Tithes, by the law, are due of ſuch mills; and a prohibition was denied.

1 Roll. Abr. 641.

It has been ſaid that the Tithes of corn-mills, whether driven by wind, water, horſe, or hand, are not perſonal, but rather predial

dial or mixt; and therefore, that, according to the cuſtom of the realm, they ought to pay the tenth toll-diſh for Tithes. 1 Roll. Abr. 656.

The canoniſts hold it to be a predial Tithe; and that the tenth toll-diſh ought to be paid without deducting the expences. Deg. p. 2.

And in the caſe of *Dodſon* v. *Oliver*, *E.* 1721, in the exchequer:---*Price* and *Montague*, barons, were of opinion, that an ancient corn-mill ought to pay the tenth toll-diſh, which being a tenth part of the thing itſelf, was a predial Tithe, and due of common right; but the Chief Baron *Bury*, and *Page*, were of opinion that it was a perſonal Tithe, and not due of common right; and the mill not having paid, is now exempt by the ſtat. of the 2d *Edw.* 6. The court being divided, the plaintiff had no decree. Bunb. 73.

Lord *Coke* in 2 *Inſt.* 621 and 652, and in divers other parts of his work, has declared the Tithe of corn-mills to be perſonal.

And in the caſe of *Newte* v. *Chamberlain*, the defendants appealed to the houſe of lords from the decree of the court of exchequer; 1 Br. Par. Ca. 157. 9 Vin. Abr. 39.

and on the part of the appellants it was inſiſted,

Firſt, That the Tithe of a mill is a perſonal Tithe, for there is no natural increaſe from it, but only a profit ariſing from the invention of a machine, and the labour of a man and horſe; and if it is perſonal, the ſame can only be for the tenth of the neat profit, deducting all charges.

Second, If a perſonal Tithe be due for ſuch a mill, it is only due where perſonal Tithes have been by cuſtom paid for forty years before the ſtatute of 2 and 3 *Edw.* 6. *c.* 13.

Third, Though the appellants only took two-pence a buſhel for grinding, yet the reſpondent did not prove any cuſtom, nor the value of the tenth toll-diſh, nor any other toll to be taken by the appellants.

Fourth, That the tenth toll-diſh would be more, ſometimes, than the whole proprietors gains, conſidering the expence of erecting, working, *&c.* of the ſaid mill.

Fifth, That the corn would pay Tithe twice, for that moſt of the ſaid corn which was ſo ground was grown within the ſame pariſh,

pariſh, and ſo the tenth paid to the reſpondent in the field; and if any was ground that grew elſewhere, the ſame did in like manner pay the tenth to the incumbent where it grew.

On the reſpondent's part it was inſiſted,

Firſt, That Tithes were due, both by the canon and ſtatute law, for new erected mills; that Tithes were by the canons due for all mills; and by *Articuli cleri*, *c.* 5, for new erected mills, which expreſsly provides that no prohibition ſhall lie in ſuch caſe.

Second, That there had been, from time to time, ſeveral reſolutions and decrees for Tithes of mills.

Third, That the reſt of the mills within the reſpondent's portions had all along paid, and did ſtill pay Tithes for the ſame; and every *modus* for a mill proves Tithes to be due, unleſs they were diſcharged by ſuch *modus*.

Fourth, That it was a predial Tithe, and the tenth toll-diſh payable for the ſame; and ſo were the canon cuſtom, and uſage of this kingdom.

Fifth, That this was not a double Tithe, for it was paid by different perſons, and for different purpoſes: *viz.* in the firſt caſe, by the owner of the corn; and in the ſecond caſe, by owner of the mill.

This caſe was heard at the bar of the houſe of lords, 20th of *January*, 1706; and the conſideration whether the Tithes of ſuch a mill were predial, mixt, or perſonal, and if any due, in what manner payable, was referred to the judges, who attended the houſe on the 17th of *February*, and all the judges of the king's bench and common pleas (except Juſtice *Powell)* were of opinion, that the Tithes due for a new-erected mill were a perſonal tithe only; and Chief Juſtice *Holt* and Chief Juſtice *Nevor* were of opinion, that there was no Tithe due at all for ſuch a mill, becauſe a perſonal Tithe was due only, where it had been paid within forty years before, according to the ſtat. of 2 and 3 *Edw.* 6. *c.* 13. *ſ.* 7. Upon which the lords ordered that Mr. *Newte* ſhould be paid the tenth part of the profits, *&c.* deducting all charges and expences, as reparations, *&c.*; and that the appellants ſhould account with him in the court of exchequer for theſe profits, *&c.* and that the reſpondent ſhould recover his Tithes of

of the ſaid mill in the nature of perſonal Tithes only.

And upon the authority of the above, the caſe of *Carleton*, v. *Brightwell*, *T.* 1728, has been decided, where in a bill for Tithe of a corn-mill by the tenth toll diſh, it was decreed by the maſter of the rolls, that the mill in queſtion ſhould pay only a perſonal Tithe. Sir Joſ. Jekyll 2 P. W. 463.

From the laſt recited deciſions it ſeems fully ſettled, that the Tithes of all mills are perſonal Tithes.

By the *Stat.* 9. *Ed.* 12. *St.* 1. *c.* 5. If any do erect in his ground a mill of new, and after the parſon of the ſame place demandeth Tithe for the ſame, the king's prohibition ſhall not lie. Artic. cleri.

By the word "mill" mentioned in this ſtatute corn-mills are only intended, (for at that time there were no other mills in uſe) and Gibſon ſays, that fulling-mills, tin-mills, lead-mills, plate-mills, and the like are not within this ſtat. nor is Tithe due of ſuch, otherwiſe than by cuſtom. Gibſ. 666.

By the words "of new" mentioned in this ſtatute it appears, that all corn-mills not

not erected before the time of *Ed.* 2. are Titheable in themſelves. But becauſe many mills ſince erected may be to us ancient, and their firſt erection unknown, the rule of their diſcharge I conceive muſt be, that all ſuch mills whoſe firſt erection was before time of memory, and is not otherwiſe known by matter of record, *&c.* not having been ſubject to the payment of Tithes, ſhall be intended to be erected before. But as to mills for which Tithes have been paid, and new mills, Tithes muſt be paid for them as Lord *Coke* ſaid in *Jake's* caſe.

1 Roll. Rep. 405.

Therefore when prohibitions are moved for, to ſtay ſuits for Tithes in the eccleſiaſtical courts for ancient mills, it muſt not only be ſuggeſted, that the mill is an ancient mill, but alſo that it hath never paid Tithes; and the courts of common law do generally require an affidavit to be made of the truth of ſuch ſuggeſtion, viz. That the mill is ancient, and hath not within memory paid Tithes.

2 Cro. 429.
1 Roll. Abr. 641. 652.

Alſo if a new mill be erected upon lands diſcharged of Tithes by the ſtatute for the diſſolution of monaſteries 31 *H.* 8. *c.* 13. Tithes ſhall be paid thereof by the whole court, and a prohibition lies not. For the rule

rule is *de molendino de novo erecto non jacet prohibitio.*

If there have been two ancient corn mills, for which time out of mind ſix ſhillings and eightpence hath been paid for the Tithes, and afterwards by continuance of time, the mill ſtream changes its courſe, and runs ſomewhat diſtant from its ancient ſtream, and thereupon the owner of the mills pulls down one of them, and rebuilds it in the new place where the ſtream now runs: This ſhall be diſcharged of the payment of any Tithes by force of the ancient *modus*; for this comes by the act of God, and not by the act of the Party. 1 Roll. Abr. 641, 652.

And it is ſaid, in 1 *Roll. Abr.* 651, to be held by the court, that if a man do preſcribe to pay to the parſon a certain thing as a *modus decimandi* for all the demeſnes of his manor, and he afterwards doth erect a windmill upon a parcel of the demeſnes, he ſhall not pay any Tithes for this mill; but the *modus* given for the demeſnes ſhall go in diſcharge of it alſo, it being built upon the land diſcharged.

So if a man ſeized of eight acres of meadow and paſture land, for the Tithes of which he uſed to pay time out of mind five ſhillings

lings and ſixpence, and afterwards he erects upon it a corn-mill, he ſhall pay no Tithes for the corn-mill, becauſe the land was diſcharged by the *modus decimandi*.

2 Inſt. 492. 1 Roll. Abr. 652.

But if there is a *modus* in lieu of all Tithes iſſuing out of a meſſuage and an ancient water-mill for corn, and a new water-mill for corn is erected within the ſaid meſſuage, or if the ſtream on which an ancient mill ſtood is diverted by the owner (and not by the act of God) and a new mill erected upon the new ſtream; they ſhall not be diſcharged by any former *modus*.

1 Roll. Abr. 641.

And it is ſaid in *Carthew* 215, that adding new ſtones to an ancient mill will not alter the *modus*, nor deſtroy it, where the ſtones are under the ſame roof. But by Lord *Hardwicke*, in the caſe of *Talbot* v. *May*, *December* 17, 1743; this to all intents and purpoſes is two mills, and the latter cannot be covered under the *modus*: you might as well ſay he might erect another mill upon the ſame ſtream and call it one mill.

3 Atk. 17.

And if the ſurmiſe be of a cuſtom to pay a certain rate of all mills erected, and to be erected, ſuch cuſtom ſhall not go to any new mill and therefore in ſuch a caſe, by

3 Bulſt. 312.

rule

rule of court, though as to the ancient mills the *modus* was allowed to be good, yet as to the new mills a conſultation was awarded.

With regard to the Tithe of mills, I ſhould conceive under the rule laid down in *Salk* 655. That a hundred or county may preſcribe in a *non decimando*. And it is ſaid in *Cumberbach's Reports* 404. That the Tithe of mills is not due of common right.

There being a difference between the ancient caſes decided relative to the Tithe of mills, and ſome of the ableſt lawyers differing in opinion, induced me to treat this ſubject ſo largely and to ſtate ſome of the caſes in ſo full a manner. But this difference by the later deciſions being happily reconciled, I conceive there can be no doubt as to the Tithe of mills being perſonal and not predial or mixt.

Perſonal Tithes ariſing as before obſerved from the clear gains made by honeſt labour, art, or induſtry of man, they will include not only all kinds of trades and manual occupations, but alſo all other lawful employments and profeſſions of life, whereby any clear gain or profit is made.

1 Roll. Abr. 656.
1 Lit. Rep. 147.
2 Inſt. 621.

From 649, 557.

From whence it appears,

Firſt, That the occupation or employment muſt be lawful. For of profits made by unlawful employments no Tithes are to be paid.

Yet *Degge* 341, ſays, there has been ſome queſtion amongſt the ſchoolmen and canoniſts, whether perſonal gains ought to be paid.

Of unlawful gain, and according to a great doctor's opinion, it ſeems that of ill gotten gain, of which reſtitution ought to be made, no perſonal Tithe is due; and yet of by ill gotten gain a field be purchaſed, Tithe ought to be paid of the fruits thereof. But if ill gotten gain where no reſtitution is to be made, there Tithes ought to be paid, but not received by the church till the ſinner have repented him of the evil, and after ſuch repentance the church may receive them.

Second, That the gains muſt be clear, *i. e.* all charges and expences deducted. Therefore in the caſe of fiſhers, hunters, fowlers and other employments, no Tithes can be due *de jure*, till the clear profits are aſcertained; and conſequently that of common right, Tithes in kind are not to be paid,

but

but only the tenth of the clear profits made upon the ſale after all charges and expences deducted.

By cuſtom a perſonal Tithe may be paid in kind of things taken or acquired by fiſhing, hunting, or fowling, as will appear from divers caſes hereafter mentioned.

And it is commonly ſaid in our books that no Tithes are due of common right for things that are *feræ naturæ*, and yet by cuſtom Tithes may be payable of or for ſuch things.

As where fiſh are taken in the ſea, though they are *feræ naturæ*, and conſequently not Tithable of common right, yet by the cuſtom they are Tithable as a perſonal Tithe, *i. e.* not by the tenth fiſh or in kind, but by ſome ſmall ſum of money in conſideration of the profits made thereby. 1 Cro. 192. Rep. Chan. 406.

Therefore if the owner of a ſhip do lend it to mariners, to go to an iſland to fiſh, for a certain quantity of fiſh to be paid to him upon their return, no Tithes are to be paid by the mariners to the parſon out of the fiſh which the owner ſhall have for the hire of the ſhip, for that it is a perſonal Tithe,

Tithe, and therefore ought to be paid out of the clear gain.

1 Roll. Abr. 656.

And in *Devon* it is cuſtomary to take a part of the pilchards or herrings, for the hire of a ſhip or boat.

Ibid. p. 2.

And as to the cuſtom of Tithing fiſh in pariſhes bordering on the ſea coaſts, the *Stat.* 2, and 3. *Ed.* 6. *c.* 13. *s.* 11. "Pro-"vides that the ſaid act, nor any thing "therein contained, (with reſpect to per-"ſonal Tithes) ſhall extend to any pariſh "which ſtands upon, and towards the ſea "coaſts, the commodities and occupying "whereof conſiſteth chiefly in fiſhing and "have by reaſon thereof uſed to pay and "ſatisfy their Tithes by fiſh; but that all "and every ſuch pariſh and pariſhes ſhall "hereafter pay their Tithes according to "the laudable cuſtoms, as they have here-"tofore of ancient time within theſe forty "years uſed and accuſtomed, and ſhall pay "their offerings as is aforeſaid."

And according to this ſtatute, where one libelled in the ſpiritual court for the Tithes of pilchards taken in the ſea, a prohibition was granted upon the ſurmiſe of a cuſtom there, that the owner of the fiſhing boat hath

on

c

one moiety of the fiſhes, and tne fiſhermen the other moiety, and that the owner hath uſed to pay the tenth of his moiety for all; this ſurmiſe was held to be good and ſufficient. Noy. 108.

And ſo when a ſurmiſe was, that all the fiſh of a ſhip ſhould be divided into ten doles (after the owner's part was ſeparated from them, for the uſe of the ſhip) and then the tenth dole to be divided, one moiety whereof to be to the parſon and the other moiety to the town, *viz.* of *Yarmouth*, this was admitted to be good. 1 Roll. Rep. 419.

And in the caſe of *Shepherd* and *Penroſe*, *E.* 18. *c.* 2. Where a prohibition was for ſtaying a ſuit in the eccleſiaſtical court for Tithes of fiſh taken in the ſea, and the queſtion was whether the twentieth fiſh was a good payment in ſatisfaction of all fiſh there taken.

Per cur. The Tithes of fiſh are not due without a cuſtom, and therefore a cuſtom to pay leſs than a tenth part thereof may be good. Prohibition granted. 1 Lev. 179. 1 Sid. 278. 2 Keeb. 2.

And in the caſe of *Holland*, v. *Heal*, 1 *Roll. Abr.* 636. *Noy.* 108. where upon a ſuit in the ſpiritual court for the (cuſtomary) S. C. 1 And. 199.

Tithe of fiſh taken in the ſea a prohibition was prayed, firſt, for that fiſh in the ſea or great rivers are *feræ naturæ*, and ſecondly for that the ſea is not within any pariſh, ſo that no parſon can ſay, that that part thereof where the fiſh are taken, is within his pariſh, for Tithes of fiſh by cuſtom are paid in *Ireland*; and that in *Cornwall* they pay Tithes for fiſhing in the ſea; and that it is a cuſtom in *Yarmouth*, that Tithes ſhall be paid; and in ſuch caſes the Tithe is to be paid to the parſon of the pariſh, where the fiſh are landed. But no Tithes ſhall be paid in kind of fiſh taken in the high ſea, without a cuſtom for it.

And no Tithes *de jure* are to be paid for fiſh taken in a common river, and *E.* 5. *Car.* 1. *B. R.* A prohibition was granted to ſtay a ſuit for Tithe of eels taken in a common river in the pariſh of *Barton* in *Weſtmoreland*, and *H.* 9. *Car.* 1. a prohibition was granted to ſtay a ſuit for Tithes of trout taken in the ſame river.

1 Roll Abr. 635. c. 4. March 17. Davis 56. Cro. Car. 339. 2 Vent. 5.

And no Tithes are due *de jure* for ſalmon taken in a river.

1 Roll. Abr. 636.

Fiſh in general taken in common rivers are Tithable only by cuſtom.

Godo 406. Wood 62, c. 2.

And

And it is ſaid that for fiſh in a pond Tithes ſhall be paid, but this ſeems too general a rule and therefore muſt in a great meaſure be referred to the cuſtoms of particular places. Chan. Rep. 375.

With regard to the Tithe of fiſh in ponds ſame diſtinction will hold as in other perſonal Tithes, namely, that a profit muſt be made of them in order to entitle the parſon to his Tithe.

Deer, hares, conies, being *feræ naturæ* can only be Tithable by cuſtom and when the Tithes of them are payable, they are a perſonal Tithe.

But Tithes in kind or a *modus*, may by cuſtom be due for them.

It is the tenth of the clear profit ariſing upon their being ſold which the parſon is entitled to, *ergo*, no Tithe can be due until they are ſold.

And if they are kept merely for pleaſure, no Tithe can be due of them, becauſe the owner thereby receives no profit.

And in the caſe of *Walton*, v. *Tryon*, *M.* 1755. A bill was filed by the plaintiff for

the Tithe of rabbits, (amongſt other things) in a warren, called *Aſhurſt's Warren*, and he proved by the former incumbent's book, that the ſame had been compounded for, by payment of twenty ſhillings in money and four couple of rabbits. Cuſtomary Tithes are generally deemed perſonal Tithes, and if ſo, then a payment in lieu of Tithes will be good. Rabbits are of that nature, that it is difficult for the parſon to get at them, the times of taking uncertain, and therefore a ſmall compoſition probably was taken for them. Suppoſe a compoſition was made for hay, originally at five pounds, and afterwards a new agreement was made for four pound and one load of hay; this would be good, and an *aſſumpſit* would lie. The parſon's book proves that ſeveral couples were paid, and money alſo, and that book is always held to be good evidence.

For the defendant it was anſwered, that this Tithe can only depend on a cuſtomary immemorial right; and ſo ought to be laid in the bill. Here it is laid to be the tenth of the rabbits in kind, and the plaintiff demands it as ſuch. But this evidence is directly contrary. For by that he proves a compoſition in lieu of Tithes for them. Therefore as his evidence contradicts his

manner

manner of laying his preſcription he muſt fail in his ſuit. As to the rector's book in this caſe it is very modern; for it goes no further back than the year 1728, This indeed may be evidence of payment, but it can never be admitted as evidence to ſupport the right.

Lord Chancellor *Hardwicke*. The plaintiff by his bill demands Tithes in kind. But there is no evidence of that. The evidence offered is that four couple of rabbits have always been ſent and delivered at the parſon's houſe by the warrener, and twenty ſhillings a year paid and ſo proved by the former incumbent's book. And the argument by the plaintiff, from this evidence is, that this is a compoſition for Tithes in kind; and rightly argued, for the *modus* would be too rank. But the great thing with me is this twenty ſhillings a year. For the four couple of rabbits can neither be a *modus* nor a compoſition. Indeed payment of part of a thing in money, and part in kind has been held to be good. But I can determine nothing on this queſtion, it muſt go to be tried as to the cuſtom.

If a man hath pheaſants or partridges, and keepeth them in a place incloſed, and clips their wings, and from their eggs they

hatch and bring up young pheaſants and partridges, no Tithes ſhall be paid of theſe eggs or young becauſe they are not reclaimed, but continue *feræ naturæ*, and would fly out of the incloſure if their wings were not clipped.

Godo. 430. Roll. Abr. 636.

Godo. 430. And in 1 *Roll. Abr.* 635, it is ſaid that of pidgeons ſold Tithes ſhould be paid, but not if they be ſpent in the houſe. And the ſame reaſon (as I conceive) will hold good as to the Tithes of pheaſants and partridges, *&c. &c.* for where a profit occurs to the owner of the land, *&c.* there the parſon will be entitled to his Tithe.

In *Chan. Rep.* 408. If fowls are taken by one who hawks for his pleaſure, no Tithe ſhall be paid for them. But if a fowler takes fowl and makes a profit of them, he ſhall pay a perſonal Tithe for them.

In this chapter all perſonal Tithes ought to be treated of according to the plan propoſed; and therefore ſome inſtances of perſonal Tithes of ſuch trades and employments, as live by buying and ſelling, or manual occupation ought to be given. But theſe by cuſtom being generally reduced to the payment of a certain ſum of money

money in lieu thereof, (uſually paid at *Eaſter Whitſuntide, &c.*) as mere oblations and offerings, I have thought it beſt to treat of them under that head in the enſuing chapter.

CHAP. V.

MORTUARIES, OFFERINGS, &c.

Of Oblations, Obventions, Offerings, Marriage, Goods in Wales, &c. Mortuaries &c. the Statute 21 H. 8. *The ancient cuſtom of Mortuaries at Richmond in Yorkſhire, and the* 13 El. c. 5, &c.

IN this chapter, as before obſerved, it is intended to treat of ſuch perſonal Tithes, as by cuſtom are generally reduced to the payment of a certain ſum of money (at the times and in the manner hereafter mentioned) together with mortuaries, corſe preſents, *&c.*

The only caſe to be met with for near 200 years paſt, where the Tithe of the profits of trades as has been ſued for, is that of *Dolley* v. *Davis. M.* 11, *Jac.* 1. and it is thus reported in 2 *Bulſt.* viz.

A parſon

A parſon in Briſtol, ſued an innkeeper there in the eccleſiaſtical court, for the Tithes of the profits by him made, in his kitchen, ſtable, and wine cellar, *&c.* and in his libel ſaid, that he made great gain in ſelling of his beer (having bought it for 100l. and ſold the ſame for 1000*l*) and ſo libelled for a tenth part of the profit of the ſame, which he thereby claimed as due to him *per communem legem Angliæ.*

And in his libel he ſet forth, that, *negotiando et trafficando*, he made other gain of which he ought to have the Tithe.

Yelverton moved for a prohibition ſetting all the above matter forth in his ſuggeſtion, and further ſhewed, that the defendant had yearly of the plaintiff 40l. at leaſt (in offerings); whereupon the clerk of the papers *(Clench)* informed the court, that there was a parſon who libelled for the Tithes of the intereſt of 100l. put out at intereſt, and a prohibition was granted: And in this caſe a prohibition was awarded.

Obventions, oblations, and offerings, are but one and the ſame thing; though obvention is the largeſt word. They are of the nature of perſonal Tithes, as before obſerved, and ſo ſays *Godolphin* in his *Rep. Canon*, 426. And that they are offered

fered to God and the Church, and are reckoned perſonal Tithes, becauſe they ariſe by labour and induſtry, and are paid once a year by ſervants, and others to the parſon or vicar, according to the cuſtom of the place.

Theſe are to be paid in the place where the party dwells, at ſuch four offering days, as before the Stat. 2 and 3 *Ed* 6, *c.* 13. within the ſpace of 4 years then laſt paſt, had been uſed for the payment thereof.

By the ſtatutes now in force, they are to be paid as formerly they have been paid.

And as to obventions, oblations, and offerings, which as before obſerved are the ſame, it is enacted by 2 and 3 *Ed.* 6. *c.* 13. *S.* 7 & 8. " That all and every perſon " and perſons, (merchants, handicrafts, and " faculties) which by the laws and cuſtoms " of the realm, ought to make or pay " their offerings, ſhall yearly from hence- " forth well and truly content and pay " his or their offerings to the parſon, vicar, " proprietor, or their deputies or fermors " of the pariſh or pariſhes, where it ſhall " fortune or happen him to dwell or abide, " and that at ſuch four offering days, as at " any time heretofore within the ſpace of four

" four years laſt paſt, hath been uſed and " accuſtomed for payment of the ſame; and " in default thereof, to pay for the ſaid of- " ferings at Eaſter then next following.

And in this word, offerings are comprehended, not only thoſe ſmall cuſtomary ſums commonly paid by every perſon when he receives the ſacrament of the Lord's Supper at Eaſter, which in many places, is by cuſtom twopence for every communicant; but alſo ſuch cuſtomary payments as are paid upon marriages, baptiſms, churchings, and burials; and that theſe properly belong to the parſon or vicar of the church where they are made, and are recoverable by law, in ſuch places and caſes only, where there is cuſtom for the payment of certain ſums, upon the performance of theſe ſeveral duties.

And in the caſe of *Burdeaux* v. *Dr. Lancaſter*, *Burdeaux*, a french proteſtant, had his child baptiſed at the french church in the Savoy, and *Dr. Lancaſter* vicar of *Saint Martin's*, in which pariſh it is, together with the clerk, libelled againſt him for a fee of 2*s.* 6*d.* due to him, and 1*s.* to the clerk. And on a motion for a prohibition for the doctor, it was urged, that this was an eccleſiaſtical fee and due by the canon. Salk. 332.

But

But by *Holt C. J.* nothing can be due of common right, and how can a canon take money out of laymens pockets. *Lindwood* ſays, it is ſimony to take any thing for either chriſtening or burying, unleſs it be a fee due by cuſtom. But then a cuſtom for any perſon to take a fee for chriſtening a child, when he does not chriſten him, is not good, like the caſe in *Hobart*, where one dies in one pariſh and is buried in another, the pariſh where he died ſhall not have a burying fee. If you have a right to chriſten, you ſhould libel for that right: But you ought not to have money for chriſtening when you do not.

Ib. 334. And in the *Dean* and chapter of Exeter's caſe, *Serjeant Hooper* ſhewed cauſe againſt a rule for a prohibition to the ſpiritual court, to ſtay a ſuit for a cuſtomary fee of 10*l.* as due to the dean and chapter of Exeter for burying in the cathedral church; *ſed non allocatur*, for no fee is due for burial of common right: But where a licence is neceſſary, the perſon giving it may ſtand up for his own price; and if there be ſuch a cuſtom it is triable at common law. If the cuſtom be not denied, the ſpiritual court ſhall proceed; for there is no other remedy: But if the cuſtom be not denied, a prohibition ſhall go, not *propter defectu jurisdictionis*, but *triationis*; and that burials at common

3 Keb. 527. 2 Danv. 426.

law

law ought to be in the church yard, and without fee. 2Keb. 778.

From the above deciſions, it appears, that offerings are not due of common right, but merely by cuſtom; and indeed that inference may be drawn from the ſtatute of *circumſpecte agatis*. If a parſon demands of his pariſhioners oblations due and accuſtomed, ſuch demand ſhall be made in the ſpiritual court; in which caſe, the ſpiritual judge ſhall have power to take knowledge, notwithſtanding the king's prohibition. 13 Ed. 1.

The caſe in *Salk.* 334, ſeems decided upon the authority of this ſtat. for the court there ſaid, that where the cuſtom was not denied, the ſpiritual court ſhould proceed; for otherwiſe the party would be without remedy.

The clergy formerly claimed (as appears by our books) as oblations or offerings, whatever was fixed to, or hung up in the church as banners, pennons, eſcutcheons, coat armour, *&c.* and in ſome caſes the monuments and tombs of the dead, as in Lady *Wiche's* caſe, 9 *H.* 4. The lady ſued by bill in the court of King's Bench for a coat armour and pennons with her huſband's Sir *Hugh Wiche's* arms, and a ſword, *&c.* hung up in the chapel where he was buried.

The

The parſon by his plea claimed them as oblations.

But it was held, that if one has a ſeat in a church or chapel, and bring thither his carpet, livery, and cuſhions, the parſon cannot claim them as oblations; nor could he claim coat armour, pennons, *&c.* hung up in a church; for they are placed there in honour of the dead.

9 H. 4. 14. 21 Ed. 348. And the chief juſtice ſaid, the lady might well maintain her action, during her life, for that ſhe cauſed thoſe things to be ſet up there, and after her death, the heir ſhall have his action for taking them, they being as heir looms which belong to the heir.

Gibſ. 739. The four offering days intended by the Stat. 2 & 3 *Ed.* 6r *c.* 13. are Chriſtmas, Eaſter, Whitſuntide, and the feaſt of the dedication of the pariſh church.

And by caſes in *Bunbury* 173. 198, it hath been decreed, that Eaſter offerings are due of common right, and not by cuſtom only.

Concerning the offerings at Eaſter; it is directed by the rubick at the end of the communion office, that yearly at Eaſter, every

every parishioner shall reckon with the parson, vicar or curate, or his or their deputy or deputies, and pay to him or them all ecclesiastical duties, accustomably due, then at that time to be paid.

Besides the oblations on the four principal festivals, there were occasional oblations upon particular services: of which there were some free and voluntary, which the parishioners or others were not bound to perform but *ad libitum*. Deg. p. 2. c. 23.

But those offerings which were free and voluntary are now vanished, and are not comprehended within the aforesaid act; but those that were customary and certain; as for communicants, marriages, christenings, churching of women, and burials, are confirmed. Deg. p. 2. c. 23.

Sir *Simon Degge* conceiveth, that an action may be formed at law upon the statute. Ibid.

However it is certain, that by the 7 & 8 *W.* 3. *c.* 6. offerings oblations and obventions may be recovered before the justices of the peace.

And it likewise appears from some old british customs, that the clergy in Wales, *&c.* also claimed the Tithe of all the goods and

and chattels, which were given in marriage with any perſon; and this appears by the ſaid *Statute* 2 and 3 *Edw.* 6. *c.* 13, *ſ.* 16. which recites, " Whereas, heretofore ſuch " a cuſtom hath been in many parts of " *Wales*, that of ſuch cattle and goods as " have been given with the marriage of " any perſon, theſe Tithes have been ex- " acted and levied by the parſons and " curates in thoſe parts, which cuſtom be- " ing diſſonant from any part of this realm, " as it ſeemed aroſe when the ſaid country " of *Wales* was, through civil diſſention, " inculted, for want of other ſufficient " profits that might otherwiſe grow to the " curates and miniſters there, to have been " for that time tolerable; ſo now, the " country there being well manured and " huſbanded, and the Tithe is duly paid " there of corn, hay, wool, and cheeſe, and " of other increaſe of all manner of cattle, " as it is commonly in all other parts of " this realm, the ſame cuſtom ſeems to be " grievous and unreaſonable, eſpecially " where the benefices are elſe ſufficient for " the finding of the ſaid miniſters and " curates.

" That it be thereforé enacted, that from " and after the firſt day of *May* next com- " ing, no ſuch Tithes of marriage goods

" be

" be exacted or required of any perſon or " perſons within the ſaid dominion of " *Wales*, or marches of the ſame, any " thing in this act contained, or any other " act, cuſtom, or preſcription had or made " to the contrary hereof notwithſtand- " ing."

Thus having treated at large of obventions, oblations, and offerings, which, as before obſerved, are reckoned amongſt the perſonal Tithes, I ſhall conclude by an obſervation of Sir *Simon Degge* (*p.* 2. *c.* 22.) that, " *Hæ decimæ perſonales magis difficultate et ſubtilitate quam utilitate exiſtunt.*

Although mortuaries, in ſtrictneſs, do not come under conſideration in this work, yet, they forming a part of the revenue of the clergy, and being paid by the pariſhioner, I think I may well mention them, and more eſpecially as, according to *Lindwood*, they were given or paid, *pro recompenſatione ſubſtractionis decimarum perſonalium nec non oblationum.*

Dr. *Stillingfleet* makes a diſtinction between mortuaries and corſe (or corpſe) preſents: the mortuary, he ſays, was a right ſettled on the church, upon the deceaſe of a 1 Still. 172

member of it; and a corſe preſent was a voluntary oblation uſually made at funerals.

And it ſeemeth, that in ancient times a man might not diſpoſe of his goods by his laſt will and teſtament, without firſt aſſigning a ſufficient mortuary to the church. And this, in a conſtitution of Archbiſhop *Winchelſea*, is called the principal legacy; ſo denominated, (ſaith *Lindwood*) becauſe they who died did bequeath the beſt or the ſecond beſt of their goods to God and the church, in the firſt place, and before other
Lind. 196. legacies.

And in another conſtitution of the ſame archbiſhop it is enjoined, that if a perſon at the time of his death have three or more quick goods, the firſt beſt ſhall be given to him to whom it was due: that is, to the lord of the ſee for a heriot; and the ſecond
Ibid 184. beſt ſhall be reſerved to the church, where the deceaſed perſon received the ſacraments whilſt he lived.

And this, in general, was carried to the church with the dead corpſe. And Mr. *Selden* quotes an ancient record, wherein it is recited, that a horſe was preſent at the
Seld. 287. church the ſame day in the name of a mortuary, and that the parſon received him according

according to the cuſtom of the land, and of the holy church.

By the *Stat.* 21. *H.* 8. *c.* 6.—" Foraſmuch as queſtion and doubt hath ariſen from the order, manner, and form of demanding, receiving, and claiming of mortuaries, otherwiſe called corſe preſents, as well for the greatneſs and value of the ſame, which, as hath been lately taken, is thought over exceſſive to the poor people and other perſons of this realm; as alſo, for that ſuch mortuaries or corſe preſents have been demanded and levied for ſuch, as at the time of their death have had no property in any goods or chattels, and many times for travelling and wayfaring men, in the places where they have fortuned to die; to the intent, therefore, that all doubt, contention, and uncertainty herein may be removed, and as well the generality of the king's people remedied, as alſo the parſons, vicars, pariſh prieſts, curates, and others having intereſt in ſuch mortuaries and corſe preſents indifferently provided for: it is enacted, " That no parſon, vicar, curate, " or pariſh prieſt, nor any other ſpiritual " perſon, nor their farmers, bailiffs, nor " leſſees, ſhall take, receive, or demand " of any perſon within this realm, for any " other perſon dying within the ſame, any

" manner of mortuary or corſe preſent, nor
" any ſum of money, nor any other thing
" for the ſame, more than is hereafter men-
" tioned; nor ſhall convent or call any
" perſon before any judge ſpiritual for the
" recovery of any ſuch mortuaries or corſe
" preſents, or any other thing for the ſame
" more than is hereafter mentioned, on
" pain to forfeit for every time ſo demand-
" ing, receiving, taking, or conventing or
" calling any ſuch perſon before any ſpi-
" ritual judge, ſo much in value as they
" ſhall take above the ſum limitted by this
" act, and, over that, forty ſhillings to the
" party grieved contrary to this act, to be
S. 1 & 2. " recovered by action of debt.

" And no manner of mortuary ſhall be
" taken or demanded of any perſon what-
" ſoever, which at the time of his death
" hath in moveable goods under the value
S. 3. " of *ten marks*.

" And no mortuary ſhall be given or
" demanded of any perſon but only in
" ſuch place where heretofore mortuaries
" have been uſed to be paid and given,
" and in thoſe places, none otherwiſe, but
" after the rate and form hereafter men-
Ibid. " tioned.

" And

" And no perſon ſhall pay mortuaries in Ibid.
" more places than one, that is to ſay, in
" the places of their moſt dwelling habi-
" tations, and there but one mortuary.

" And no parſon, vicar, curate, pariſh
" prieſt, or other, ſhall for any perſon dy-
" ing, or dead, and being at the time of
" his death of the value, in moveable goods,
" of ten marks or more, clearly above his
" debts paid, and under the ſum of thirty
" pounds take for a mortuary above 3s. 4d.
" in the whole; and for a perſon dying,
" or dead, being at the time of his death of
" the value of thirty pounds, or above,
" clearly above his debts paid, in move-
" able goods, and under the value of forty
" pounds, there ſhall be no more taken or
" demanded for a mortuary than 6s. 8d.
" in the whole; and for any perſon dying
" or dead, having, at the time of his death,
" of the value, in moveable goods, of forty
" pounds or above, to any ſum whatſoever
" it be, clearly above, his debts paid,
" there ſhall be no more taken, paid, or
" demanded for a mortuary than 10s. in
" the whole.

" Provided that for no woman being
" covert baron, nor child, nor for any per-
" ſon not keeping houſe, any manner of

" mortuary, nor any thing or money by
" way of mortuary, ſhall be paid; nor alſo
" for any way-faring man, or other, that
" dwelleth not, nor maketh reſidence in the
" place where they ſhall happen to die;
" but that the mortuary of ſuch way-faring
" perſons be anſwerable in places where
" mortuaries be accuſtomed to be paid in
" manner and form, and after the rate be-
" forementioned, and none otherwiſe, in
" the place or places where ſuch way-faring
" perſons, at the time of their death, had
" their moſt habitation, houſe, and dwel-
S. 4. " ling places, and no where elſe.

" Provided that it ſhall be lawful to all
" parſons, vicars, curates, pariſh prieſts,
" and other ſpiritual perſons, to take any
" ſum of money or other thing, which by
" any perſon dying, ſhall be diſpoſed,
" given, or bequeathed to them or any of
S. 5. " them, or to the high altar of the church,

" And no mortuaries nor corſe preſents,
" nor any ſum of money or other thing
" for any mortuary or corſe preſent, ſhall
" be demanded or taken in the parts of
" *Wales*, nor in the marches of the ſame,
" nor in the town of *Berwick*, but only in
" ſuch places of the ſame where mortuaries
" have been accuſtomed to be paid: and

" in

" in thoſe places no mortuaries or corſe
" preſents ſhall be demanded or taken, but
" only after the form and manner above
" ſpecified, and none otherwiſe, nor of any
" other perſon than is limited by this act,
" upon the pain contained therein. S. 6.

" Provided alſo, that it ſhall be lawful
" to the Biſhops of *Bangor*, *Landaff*, *St.*
" *David's*, and *St. Aſaph*, and likewiſe to
" the Archdeacon of *Cheſter*, to take ſuch
" mortuaries of the prieſts within their
" dioceſes and juriſdictions as heretofore
" have been accuſtomed. S. 7.

" Provided alſo, that in ſuch places
" where mortuaries have been accuſtomed
" to be taken of leſs value than is afore-
" ſaid, no perſon ſhall be compelled to pay
" in ſuch place any other mortuary, or
" more for any mortuary than hath been
" accuſtomed; nor that any mortuary in
" ſuch place ſhall be demanded or taken
" of any perſon exempt by this act, upon
" the pain before limited." Ibid.

But all mortuaries are now taken away in the ſaid dioceſes of *Bangor*, *Landaff*, *St. David's*, and *St. Aſaph's*, and a recompence given to the biſhops in lieu thereof, by 12 *An. Seſſ.* 2. *c.* 6.

3 Cro. And in the caſe of *Hind* v. Biſhop of *Cheſter*, in the caſe of a prohibition, for that the defendant ſued in the conſiſtory court of the Biſhop of *Cheſter*, before the commiſſary, for a mortuary after the death of every prieſt within the archdeaconry of *Cheſter*, *viz.* his beſt horſe or mare, his ſaddle, bridle, ſpurs, his beſt gown, his beſt ſignet or ring, his beſt hat, his beſt upper garment under his gown, as due to the biſhop *de debito conſuetudine fore ſupponitur*.

The plaintiff averred there was no ſuch cuſtom there, and that ſhe had already paid a mortuary to the parſon of *B.* and that after a prohibition the defendant had proſecuted his ſuit in the ſpiritual court, and thereupon the queſtions in *B. R.* were,

Firſt, Whether there was a cuſtom in that place to give ſuch a thing for a mortuary?

Second, Whether, if ſo, it be a juſt cauſe for a prohibition, mortuaries being triable only in the ſpiritual court?

Third, Whether a conſultation ſhould be granted without anſwering the prohibition?

The

The court was divided in opinion, and ordered the defendant to plead or demur, and then they would give judgment upon the return before them.

But by the 28 *G.* 2. *c.* 6. the aforeſaid clauſe, ſo far as it relates to the taking of any mortuary, or corſe preſent upon the death of any clergyman within the archdeaconry of *Cheſter*, ſhall immediately after the living of *Wareton*, become void, be repealed, and the ſaid living ſhall be annexed to the ſee of *Cheſter*, in compenſation of ſuch mortuaries.

Before the reign of *Henry* the 8th a very ſingular cuſtom exiſted within the archdeaconry of *Richmond*, in the county of *York*. Of very ancient time the inhabitants of the pariſh of *St. Rumald's Kirk*, and after their example the inhabitants of the ſeveral other pariſhes within the archdeaconry, being diſſatisfied, for that the executors or adminiſtrators of perſons deceaſed gave nothing of the deceaſed's perſonal eſtate to the pariſh church, for the miniſter (according to the ſuperſtition of thoſe times) to pray for the ſoul of the deceaſed; whereas by the cuſtom eſtabliſhed within the province of *York* (and at that time throughout the whole kingdom) a certain portion of the Reg. ho. Rich. 101.

the deceaſed's perſonal eſtate ought to go and be diſpoſed for the welfare of the ſoul of the deceaſed, which portion ſuch perſon himſelf could not otherwiſe diſpoſe of by will, nor his adminiſtrator at his death, in caſe of inteſtacy; and this was, if the deceaſed did leave a wife, and alſo a child or children, a third part of the clear perſonal eſtate; if he left a wife and no child, or a child or children and no wife, then a moiety; and if neither wife nor child, then the whole was the dead man's portion to be diſpoſed of for the good of his ſoul. Now the inhabitants aforeſaid obſerving that the executors or adminiſtrators took and applied this whole dead man's portion to their own uſe, came to an agreement and reſolution amongſt themſelves to ſettle and eſtabliſh for ever inviolably a determinate ſhare of the ſaid dead man's part, to be given to the incumbent of their pariſh church to pray for the ſoul of the deceaſed.

But in proceſs of time their poſterity thinking this conceſſion too burthenſome, applied to the court of *Rome* for redreſs: ſetting forth that the clergy, although they received, according to the cuſtom of the kingdom of *England*, one of the two beſt quick goods of the deceaſed, was demanded alſo one other of the beſt quick goods, and

and likewiſe the ninth part of all the moveable goods of the deceaſed, if he had a wife and children; if he had a wife and no child, or a child or children and no wife, then a ſixth part; and if he had neither wife nor child, then a third part.

The pope having granted a commiſſion to hear and determine the cauſe, did finally in the year 1254 order and decree, that for the future the clergy ſhould receive only one of the two beſt quick goods; and if the deceaſed left a wife and children, his whole clear perſonal eſtate ſhould be divided into three parts, of which the wife ſhould have one, the children another, and the third (being the dead man's part) ſhould be divided into four, of which four parts the church ſhould receive one; if the deceaſed left a wife and no child, or a child or children and no wife, then the whole ſhould be divided into two parts, of which the wife or children reſpectively ſhould have one, and the other part (being the dead man's ſhare) ſhould be divided into five, of which five parts the church ſhould have one; if he had neither wife nor chid, then the whole (as pertaining entirely to the deceaſed) ſhould be divided into ſix, of which ſix parts the church ſhould have one.

So

So that in the firſt caſe, where there were both wife and children, the church ſhould have a twelfth part; in the ſecond caſe, where there was a wife and no child, or a child or children and no wife, a tenth part; and in the third caſe, where there was neither wife nor child, the church ſhould have a ſixth part.

The clergy in the ſaid archdeaconry of *Richmond*, notwithſtanding the ſtatute of 21 *H.* 8. for limiting the ſums to be paid for mortuaries, ſtill inſiſted that this was not a mortuary, but called it a penſion or portion, and therefore not within the ſtatute.

But this cuſtom, by whatever name it may be called, is effectually aboliſhed by 26 *H.* 8. *c.* 15.---" Foraſmuch as divers " ſubjects inhabited within the archdea- " conry of *Richmond*, in the county of " *York*, be, and of long time have been, " ſore and grievouſly exacted and im- " poveriſhed by the parſons, vicars, and " others, ſuch as have benefices and ſpi- " ritual promotions within the ſame, as by " taking of every perſon when he dieth, " in the name of a penſion or of a portion, " ſometimes the ninth part of all his goods " and chattles, and ſometimes the third " part, to the open and manifeſt im-

" poveriſhment

" poveriſhment of moſt part of the king's " poor ſubjects inhabiting and deceaſing " within the ſame:

" That no manner of ſpiritual perſon or " other, having any benefice or other ſpi- " ritual promotion within the ſaid arch- " deaconry, ſhall in any wiſe aſk, levy, de- " mand, or take, after the deceaſe of any " perſon, any ſuch portions or penſions, or " or any other demand or duty in the name " or in lieu of the ſame, on pain of a *præ-* " *munire*; but that all the king's ſubjects " of the ſaid archdeaconry, and their exe- " cutors and adminiſtrators, ſhall be or- " dered and uſed for their goods and chat- " tels after their deceaſe, in like manner as " is contained in the ſtatute of the 21ſt " *H.* 8. *c.* 5. for probate of teſtaments, and " none otherwiſe, any uſe, cuſtom, bull, " compoſition, preſcription, or ordinance, " to the contrary notwithſtanding."

Mortuaries are only due by cuſtom, as in the caſe of *Broad* v. *Piper*, where it was agreed by the court, that no mortuary is due or payable but by the particular cuſtom of the place. 3 Mod. 268. Cumb. 166.

And Lord *Coke*, in 2 *Inſt.* 491, ſays, that no mortuary is due by law, only by cuſtom,

as

as is proved by the words of the ſtatute of *circumſpecte agatis*; which are, "in places where mortuaries have been uſed to be given;" and the conſtant courſe of pleading, claiming them always by cuſtom, ſhews it to be ſo.

And *Selden* in his hiſtory of Tithes p. 287, ſays, the ancient uſe was to bring the mortuary along with the corpſe, when it came to be buried, and preſented in its name.

Lind. Spel. Trea. de ſepul. 35. ſ. 9. c. 1.

Alſo a mortuary is not properly and originally due to any eccleſiaſtical incumbent, parſon or vicar, but from thoſe only of his own pariſh to whom he miniſtreth ſpiritual inſtruction, *&c.*

But notwithſtanding all this, 'tis ſaid, the prevalency of argument is ſuch, that in ſome places of this kingdom, mortuaries are or have been paid to the incumbents of other pariſhes that performed no miniſterial duty at all to the deceaſed party, either living or dying. And 'tis ſaid, the ſtat. 21. *H.* 8. *c.* 6. does not at all controul that courſe, but makes uſage of payment to be the only rule thereof.

Rep. Chan. 424, 599.

By

By the ſtatute of *circumſpectè agatis.* 13 *Ed.* 1. *ſt.* 4. If a parſon demand mortuaries in places where a mortuary hath been uſed to be given, all ſuch demands ſhall be made in the ſpiritual court: and in all ſuch caſes the ſpiritual judge ſhall have power to take knowledge, notwithſtanding the king's prohibition.

And it is ſaid, that ſince the ſtatute 21 *H.* 8, *c.* 6. whereby mortuaries, are reduced to a certainty to be paid in money, that an action of debt will lie upon the ſaid ſtatute in the courts of common law, for recovery of the ſum due for a mortuary, although before that ſtatute, mortuaries were recoverable in the ſpiritual court only; for although the ſtatute be only in the negative, yet it implies an affirmative, that thoſe rates ſet down in the ſtatute may be taken where by cuſtom mortuaries are due; ſo that the ſtatute has made it a duty fixed in the party, and then by conſequence the law will give a proper remedy for the recovery of it. Wats c. 53.

But *Watſon* in citing this from Sir *S. Degge*, ſays, "But as I have never heard of any ſuch action of debt being brought for a mortuary, ſo I very much doubt whether ſuch action is maintainable, and rather think it is not,

but

but that it ſtill remains as a matter ſuable for, only in the ſpiritual court.

1 Ld. Raym. 609. And in the caſe of *Johnſon* v. *Oldham*, *M.* 12, *W.* 3. A prohibition was moved for, to be directed to the ſpiritual court, to ſtay a ſuit there for a mortuary, upon a ſuggeſtion of the ſtatute, and that there was no cuſtom in this caſe for the payment of it, and it was urged, that no mortuary was due but by cuſtom; and therefore the cuſtom here being denied they ought not to proceed in the ſpiritual court.

Againſt which it was argued, that the ſtatute of *H.* 8. hath ſaved the juriſdiction to the ſpiritual court, where mortuaries have been uſually paid: beſides they ought firſt to plead in the ſpiritual court, that there is not any ſuch cuſtom; and then upon refuſal to admit the plea there, is the time to move the court of king's bench, and not before; but in this caſe they have not pleaded this matter in the ſpiritual court.

By *Holt* chief juſtice; "a prohibition cannot be granted, without a denying of the cuſtom in the ſpiritual court, which is not done here." And the whole court ſeemed to be againſt the prohibition. And a rule was made

made to hear counſel on both ſides. But the rule was afterwards diſcharged by the court.

But if the cuſtom be denied, and the ſpiritual court will not admit that plea, a prohibition will go; and they ſhall not try the cuſtom there. Cro. El. 151.

But where the cuſtom of paying a mortuary was owned, and the only queſtion in the ſpiritual court was, whether it belonged to the vicar or impropriator? A prohibition in ſuch caſe hath been denied. 1 Keb. 919.

In the caſe of *Tonent* and *Burley M.* 15, *G.* in the exchequer, a bill was brought to diſcover, whether the defendant's huſband died worth 40*l.* ſo as to be liable to pay the plaintiff a mortuary; and pray relief. Upon anſwer admitting aſſets, but denying the cuſtom, the plaintiff went into a proof of his right; and ſeveral witneſſes were examined on both ſides. And at the hearing the bill was diſmiſſed with coſts as to the relief, becauſe that was properly at law, or in the ſpiritual court: and in a bill againſt one perſon only, the right could not be eſtabliſhed. Str. 715.

By the 13 *El. c.* 5. All alienations of lands or goods, to defraud creditors and others of their juſt debts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs ſhall (as againſt ſuch claimants) be utterly void and of none effect.

It now ſeems fully ſettled, that no mortuary ſhall be paid, unleſs the perſon died poſſeſſed of goods to the value of ten marks *i. e.* 6*l.* 13*s.* 4*d.*

That no mortuary ſhall be paid or demanded, unleſs in places where they had uſed to be paid or given.

That no mortuary ſhall be paid but in one place; and that at the party's moſt uſual place of dwelling and habitation, and then but one.

CHAP. VI.

MODUS SOLVENDI, &c.

The manner of ſetting out Tithes, or Modus ſolvendi; *by whom Payable, and to whom Due; with the Nature of Cuſtom and Preſcription therein; and the ſeveral Statutes directing the ſame,* &c.

HAVING conſidered in the preceding chapters Tithes in their ſeveral kinds, qualities, and incidents, chiefly with regard to the thing itſelf, I ſhall next conſider them with reſpect to the manner of ſetting out, or *modus ſolvendi*, and who are to pay them, and to whom payable.

Firſt, As to the *modus ſolvendi*, or manner of ſetting out Tithes, it is ordained by a conſtitution of Archbiſhop *Winchelſea* as follows:—" Becauſe by reaſon of divers " cuſtoms in the taking of Tithes through- " out divers churches, quarrels, conten- " tions, ſcandals, and very great hatreds " between the rectors of the churches and " their pariſhioners do oftentimes ariſe, Lind. 192.

" we will and ordain, that in all the " churches eſtabliſhed throughout the pro- " vince of *Canterbury* there be one uniform " taking of Tithes and profits of the " church."

The words " between the rectors of churches," according to *Lindwood*, com-
Ibid. prehend vicars alſo, where the Tithes belong to their portion.

The words " and profits of the church:" that is, which do not conſiſt in Tithes, as
Ib. 122. oblations, mortuaries, *&c.*

But this canon, like many others, muſt in all caſes give way to the cuſtom of the place, or *lex loci*.

And it is to be obſerved, that the ſeveral ſtatutes which direct the payment of Tithes, do alſo direct the manner of payment to be according to the cuſtom of the place.

As the *Stat.* 27. *H.* 8. *c.* 20 and 21, do continue the cuſtoms of *London* in the payment of their Tithes, and 37 *H.* 8. *c.* 12.

And the 32d *Hen.* 8. *c.* 7. entitled " An act for the true payment of Tithes and offerings," in its ſecond ſection enacts,

" That

" That every perſon ſhall ſet out and pay " his Tithes according to the cuſtoms and " uſages of the pariſhes and places where " they are due."

And the *Stat.* 2 and 3. *Edw.* 6. *c.* 13. not only confirms both the ſaid former ſtatutes, but further provides and enacts, " That " the ſaid act, nor any thing therein con- " tained, ſhall not extend in any wiſe to " the inhabitants of the cities of *London* or " *Canterbury*, and ſuburbs of the ſame, nor " to any other town or place that hath uſed " to pay their Tithes by their houſes, other- " wiſe than they ought or ſhould have done " before the making of that act, any thing " therein contained to the contrary, *&c.*

And *ſect.* 1. of the ſame act directs, " That every of the king's ſubjects ſhall " from henceforth truly and juſtly, without " fraud or guile, divide, ſet out, yield, and " pay all manner of their predial Tithes, " in their proper kind, as they riſe and " happen in ſuch manner and form as of " right hath been yielded and paid within " forty years next before the making of " this act, or of right or cuſtom ought to " have been paid."

And *ſections* 5 and 6.---" The improvers " of barren land to pay for ſeven years " what was uſual." And *ſections* 7 and 8, ---" That handicrafts pay according to the " cuſtom uſed for forty years paſt." *Section* 10.---" That offerings be only paid as " accuſtomed;" and *ſection* 11.---" Tithe " to be paid only as uſual of fiſh."

The cuſtom of pariſhes or places, in the caſe of Tithes, conſiſts in general of two kinds;

Firſt, Where there is by cuſtom a *modus decimandi, i. e.* a cuſtom to pay either money or ſome other thing in lieu of Tithes in kind. [This will be treated of more fully in a ſubſequent chapter.]

Second, Where Tithe has by cuſtom been paid of things, that in their kind or nature are not Tithable, as in ſome places Tithes of things *feræ naturæ*. So the Tithe of lead in *Derbyſhire*, or of tin in *Devonſhire* or *Cornwall*.

So the cuſtom of paying the Tithe of fiſh, or for fiſhing in the ſea, *&c.* as in ſome parts of *South Wales*, where it is ſaid the cuſtom is,---that if the pariſhioner of one pariſh lands his fiſh in another, the Tithes

Tithes are divided between the parſon of the pariſh, where the fiſher lives, and the other where he lands his fiſh; but if the pariſhioner lands his fiſh in the ſame pariſh where he dwells, then the rector or parſon of that pariſh ſhall have the whole Tithe.

And in ſome places they pay Tithe of lime-kilns by cuſtom; and ſo of other things, which in their own nature are not Tithable. And note, in theſe and other like caſes, the Tithe taken is ſaid to be a Tithe againſt common right, and therefore ſuch cuſtoms ought to have ſome cuſtom or ground of reaſon for their ſupport. 1 Roll. Abr. 642.

And as by cuſtom there may be a *modus decimandi*, or one thing paid for Tithes and ſatisfaction of another; and things may be made Tithable in kind, which in their own nature are not ſo; ſo cuſtom has a great influence upon the form and manner of Tithing, and in many places and caſes directs the time, the place, and the order or method of payment.

The parſon cannot compel the owner of the land to cut his crop before it be ſpoiled, and therefore the parſon in ſuch caſe is without remedy. Godo. 394.

Neither can the parſon, vicar, impropriator, or farmer come himſelf and ſet forth the Tithes without the licence and conſent of the owner of the corn, hay, *&c.* for if the parſon ſhall of his own head Tithe the corn, hay, *&c.* of any landholder within his pariſh, *&c.* and carry it away, he is a treſpaſſer, and an action will lie againſt him for it.

Jones 90.

By the *Statute* 2 and 3 *Edw.* 6. it is enacted, "That at the Tithing time of "predial Tithes, it ſhould be lawful for "every party to whom any Tithes ought "to be paid, or his deputy or ſervant, to "ſee the ſaid Tithes to be ſet forth and "ſevered from the nine parts, and the ſame "quietly to take and carry away."

This ſtatute, as to the taking and carrying away, ſeems only declarative of the common law; but as coming upon the lands to ſee the Tithes ſet forth, ſeems to be a new authority given by this law, (for the owners of the land are *de jure* bound to ſet forth their Tithes duly and juſtly, and if they fail therein, the parſon, vicar, *&c.* have their remedies; and if the pariſhioner do juſtly and truly ſet forth his Tithes, although the parſon or vicar, *&c.* are not preſent, or had no notice given them to be preſent,

preſent, yet this had been a good ſetting forth before this ſtatute; but it is a fair and juſt way to do it in the preſence of the parſon, vicar, *&c.* And note, this act is warily penned in the ſingular number, that the party himſelf, his agent or ſervant may come to ſee the Tithes ſet forth, but muſt not come with a greater number. Deg. p. 2. c. 14.

And the laws of the church entitle the parſon to have notice given him of the ſetting out the Tithes; but by the common law ſuch notice is declared unneceſſary.

And in the caſe of *Butler*, v. *Heathby*, *Bur. Mansf.* 1891. An action upon the caſe was brought againſt the defendant for not fetching away his Tithes in a reaſonable time; the declaration ſtates that the plaintiff ſet out the Tithes and the defendant refuſed to fetch them away. At the trial the defendant's counſel inſiſted on a cuſtom in the pariſh, "that notice ſhould be given to the owner of the Tithes of the ſetting them out.

Mr. Juſtice *Gould* who tried the cauſe held the cuſtom not to be a good one, and a verdict was found for the plaintiff and thirty guineas damages; ſubject to the opinion of the court of king's bench upon the

the following queſtion, whether the cuſtom be good in law or not.

A motion had been made for a new trial and a rule to ſhew cauſe granted.

The counſel for the plaintiff denied this to be a good cuſtom. Firſt, Becauſe it was only ſetting up the eccleſiaſtical law, againſt the common law of the kingdom; Secondly, This cannot be done by cuſtom in any particular diſtrict. The farmer is not bound by common law to give previous notice of the time of his ſetting out Tithes.

By Mr. Juſtice *Wilmot*. By the common law no notice is neceſſary: by the eccleſiaſtical law it is neceſſary, the queſtion therefore is: Whether the eccleſiaſtical law can be reduced under the notion of ſuch a cuſtom? This was agreed to be the queſtion.

The plaintiff's counſel objected that this cuſtom is not a reaſonable or a good one; becauſe it is not founded upon any conſideration. And admitting the canon law to be as has been mentioned, yet it cannot be ſet up againſt the common law of the kingdom, at leaſt it ought to have been pleaded.

It

It can be no bar to this action, or to the form of it; for it is not alledged, that theſe Tithes were not fairly and honeſtly ſet out, and, if they were fairly and honeſtly ſet out, they ought to have been taken away by the impropriator. The farmer can receive no benefit by giving ſuch notice; on the contrary he may be much incommoded by being bound down to ſet them out at the particular time notified. For he cannot carry any away, till he has ſet out the whole: and a lay impropriator may reſide out of the pariſh, and at a very great diſtance; or the farmer may not know to whom notice is to be given, or where; or have time ſufficient to admit of giving ſuch previous notice of ſetting them out. Indeed notice to the owner of the Tithes of their having been ſet out is previouſly neceſſary to the bringing an action for the not carrying them away; and this notice was given.

The counſel, for the defendant, who argued in ſupport of the rule for a new trial, admitted that the common law doth not require the notice of ſetting them out, but this cuſtom does require it and they inſiſted that it is a good cuſtom. This cuſtom falſifies the demand made by the declaration; for the declaration alledges, "that the pariſhioner has always been uſed to ſet out the

the Tithes, ſo and ſo;" and that he ſet them out in due manner, and the defendant neglected to take them away." The defendant ſhews this cuſtom and that for want of purſuing it, theſe Tithes were not in due manner ſet out. And if they were not ſet out in due manner, then there was no obligation to take them away.

It is part of the definition of a cuſtom, that it differs from the common law. We would not ſay it is good becauſe it is agreeable to the canon law, we only ſay it is good as being the *lex loci*. The conſideration of cuſtoms cannot be inquired into; however if it were neceſſary to do ſo, honeſty and piety are ſufficient conſiderations for this cuſtom. But cuſtoms muſt be preſumed to have ſprung from good conſiderations. This cuſtom prevails in half the pariſhes of the weſt of *England*; and as Tithes depend, in a great meaſure upon cuſtom, ſo alſo does the manner of ſetting them out. The cuſtom does not require the parſon to be preſent, nor does it fix the tenant to reap his corn in bad weather; it is only a check againſt injuſtice being done to the parſon. A reaſonable notice is all that is requiſite.

In a cauſe at *niſi prius* in the caſe of —— v. *Yarborough*, at *Lincoln* aſſizes, Lord Chief Juſtice *Willes*, held ſuch a cuſtom to be good,

good, and wiſhed it was the law of the land. Mentioned by Mr. Wheler, from his memory as *Amicus Curiæ.*

After having taken time to conſider, Lord *Mansfield* delivered the opinion of the court. "The only queſtion is, whether this be a reaſonable cuſtom or not? There is no authority that comes up to this point, but one; and that was a cauſe on the midland circuit, before Lord Chief Juſtice *Willes*, who thought ſuch a cuſtom a reaſonable cuſtom, and I think ſo too. I believe the doubt about it aroſe from a jealouſy in receiving the eccleſiaſtical law in any caſe whatever; leſt the clergy ſhould introduce it by degrees. It is reaſonable, as promotive of juſtice and preventive of fraud." Mr. *Dunning* ſaid, as of his own knowledge, that there were ſuch cuſtoms in the weſt of *England*; and I am told there are ſuch in *Lincolnſhire*. We are all clear that it is a good cuſtom. It is for the prevention of fraud and convenience of parties. And I think it is ſuch a cuſtom, that a very ſlight evidence would be ſufficient to prove. Therefore the rule of a new trial was made abſolute.

The action for not fetching away the Tithes muſt be caſe; treſpaſs *vi et armis* will not lie, it is only a *non feaſance*, and not a *mal feaſance* as in the caſes of *Stilman*, v. *Chanor*,

v. *Chanor*, *Latch.* 8. and *Shapcott*, v. *Mugford*, 1 *Lord Raym.* 188. And for the ſame reaſon I ſhould conceive the plea of the general iſſue *not guilty* is no good plea, for they are two negatives which cannot make an iſſue any more than two affirmatives.

2 Venti. 48. 1 Roll. Abr. 643.

5 Bac. Abr. 106.

And before ſuch action can be brought, a reaſonable notice muſt be given to the owner of the Tithes of their being ſet out.

Under ſuch a cuſtom as the above, I ſhould conceive that if the pariſhioner had given notice of the time, &c. of ſetting out the Tithes, and the weather ſhould prevent its being done (according to the notice) unleſs at a very great loſs; that the pariſhioner would be at liberty to renew or continue his notice of ſetting them out till another time. For this hindrance ariſes through the act of God, and not through the negligence or fraud of the party.

The care of the Tithes, as to waſte or ſpoiling, after ſeverance, reſts upon the parſon, and not upon the owner of the land. For it ſeemeth the parſon is at his peril to take notice of the Tithes being ſet out.

Gibſ. 689.

And though a pariſhioner be bound *de jure*

jure to reap or cut his corn, hay, *&c.* and further to ſet forth the Tithes, yet having duly ſet them forth, he is not bound to watch or guard them from being ſtolen or eaten; but the parſon is bound to take care of them and carry them away in convenient time; for if, through his neglect to carry them away, the Tithes are eaten or loſt, he ſhall not have Tithes again; and if in ſuch caſe he ſues the pariſhioner, who has once duly ſet them forth, in the ſpiritual court, and the pariſhioner offers the ſpecial matter by way of plea there, and they refuſe to allow of ſuch plea, a prohibition lies. Noy 31. 2 Leon. 101.

And by 3 *Keeb.* 846. *Moor.* 912. 3 *Cro.* 607. 4 *Leonard* 7. 1 *Sid.* 92. It appears that, if Tithes are once ſevered, and afterwards taken away by a ſtranger, the parſon cannot ſue the owner, but may ſue ſuch ſtranger at the common law only.

After the Tithes are ſet forth, the proprietors of the Tithes may *de jure* come himſelf, or his ſervants, ſpread abroad, dry and ſtack his corn, hay or the like, in any convenient place or places upon the ground where the ſame grew, till it be ſufficiently weathered and fit to be carried into the barn. But he muſt not take a longer time for the doing thereof, than what is convenient and neceſſary;

neceſſary; and what ſhall be deemed a convenient and neceſſary time, the law doth not nor can define; for the quantity of corn and hay, and the weather in this caſe are to be conſidered; and what ſhall in this, and all other caſes of like nature, be ſaid to be a reaſonable and convenient time, is to be determined by the jury, if the point come in iſſue triable by a jury; but if it come to be determined upon a demurrer, or other matter of law, the judges of the court where the cauſe depends are to reſolve the ſame.

1 Roll. Abr. 643. X 2. Dec. 2. c. 14. Str. 245.

And by the beforementioned ſtatute of 2 & 3 *Ed.* 6. it ſhall be lawful for the parſon or other proprietor of predial Tithes, to ſee the ſaid Tithes ſet forth and ſevered from the nine parts, and the ſame quietly to take and carry away. And if any perſon carry away his corn, or hay, or other predial Tithes, before the Tithe be ſet forth, or willingly withdraw his Tithes of the ſame or of ſuch other things whereof predial Tithes ought to be paid; and if any perſon do ſtop, the parſon, vicar, proprietor, owner or other their deputies or farmers, to view, take or carry away their Tithes as is aboveſaid; he ſhall forfeit double value, with coſts, to be recovered in the eccleſiaſtical court, according to the king's eccleſiaſtical laws.

And

And he may carry away his Tithes from the ground where they grew, either by the common way, or any ſuch way as the owner of the land uſeth to carry away his nine parts. Deg. p. 2. c. 14.

But if the owner of the ſoil after he has duly ſet forth his Tithes will ſtop up the ways, and not ſuffer the parſon, vicar, *&c.* to carry away his Tithes, or to ſpread dry and ſtack them upon the land, this is no good ſetting forth of his Tithes without fraud, within the ſtatute: but that the parſon, vicar, *&c.* or other owner or farmer, may have an action upon the ſaid ſtatute, and may recover the treble value; or may have an action upon the caſe for ſuch diſturbance, as it ſeemeth; or he may if he will, break open the gate, fence, *&c.* which hinders him, and carry away his Tithes. 1 Bulſt. 108. Deg. p. 2. c. 14.

But if he proceeds in the laſt way, he muſt be cautious that he commit no riot, nor break any gate, rails, locks or hedges, more than neceſſarily he muſt for his paſſage. Ibid.

And if the pariſhioner duly ſet forth his Tithe of hay or corn, and will not permit the parſon, vicar, *&c.* to make the hay, or ſpread and dry the corn, as he ought, it amounts to a ſubſtraction of the Tithes, and

the parſon may ſue for the ſubſtraction of ſuch Tithes in the ſpiritual court, and no prohibition lies in this caſe.

Ibid.

And when the parſon, or other proprietor of the Tithes, comes with his carts, teams, or other carriages, to carry away his Tithes, he muſt not ſuffer his horſes or oxen to eat and depaſture the graſs growing in the grounds whither the Tithes ariſe, much leſs the corn there growing or cut: but if his cattle (as cannot be avoided) do in their paſſage, againſt the will of the drivers, here and there ſnatch ſome of the graſs, this is excuſable.

Ibid.

And if Tithes ſet out, remain too long upon the land, the owner of the ſoil may take them damage *feaſant*, but then if he be ſued for them, in order to juſtify, he muſt ſet forth how long they had remained before he took them; and when they ſhall be ſaid to remain too long is triable by a jury.

3 Bulſt 336. Latch 8.

Or an action upon the caſe will lie againſt the parſon for his negligence in this behalf: But no action in ſuch caſe will lie (as before obſerved) unleſs the pariſhioner hath duly ſet forth his Tithes, and hath alſo given notice to the parſon that they are ſo ſet forth.

But

But the occupier of the ground cannot put in his cattle, and deſtroy the corn or other Tithe; for that is to make himſelf a judge, what ſhall be deemed a convenient time for taking it away; but the court and jury, upon an action brought, are to determine of the reaſonableneſs of time, and of the recompence to be made for the injury ſuſtained. As in the caſe of *Gale* v. *Ewer*, *Comyns* 23. where *Holt*, chief juſtice, held the turning of cattle to the Tithe, a fraudulent ſeverance, and that a ſuit might be maintained for it in the ſpiritual court.

We ſhall now conſider by whom Tithes are to be paid, and to whom payable. Firſt, It is generally ſaid, that anciently, both by the ſpiritual and common law, every man, whether alien or denizen, noble or ignoble, bond or free, was bound to pay his Tithes. And ſo he is at this day, except he can ſhew ſome ſpecial exemption or diſcharge either by cuſtom, preſcription, or act of parliament. 2 Co. 44.

But what lands, and what perſons may be diſcharged of Tithes; as alſo how, and in what manner it may be done, ſee more fully diſcuſſed in the following chapters.

In the mean time as to the perſon paying, the following rules may be obſerved, viz.

He that receives or takes the nine parts to himſelf, is to pay the tenth or other part to the parſon or other proprietor, (by this are only underſtood predial or mixt Tithes.)

If a man buy underwood or corn, or graſs, that is Tithable on the ground ſtanding, he that buys it and not the owner of the land, *&c.* muſt pay the Tithe.

As in a caſe in *Hard.* 380, 381. If a man has a nurſery of trees, and he ſells them, and pulls them up himſelf, he ſhall pay the Tithe; but if he ſells them particularly (*i. e.* ſtanding by parcels) to another, the vendee ſhall pay the Tithes.

And in a caſe in *Roll. Rep.* 78, in the caſe of Tithe corn, if it be ſold ſtanding, the vendee ſhall pay the Tithe; but if ſold after ſeverance, the vendor muſt pay it.

And in *Noy* 152. *Palm.* 38. 2 *Roll. Rep.* 430. 1 *Roll Abr.* 676. If a man ſell wood, and it is burnt in the vendee's houſe, the vendor ſhall be charged with the Tithes, and not the vendee; for no Tithes ſhall be paid for wood burnt in his houſe. And *per cur*

a prohibition was granted accordingly; although it was ſaid, that by the civil law, the parſon hath his election to ſue either vendor or vendee; but this croſſes the common law: And that the parſon ſhall not be compelled to ſue the vendee, who perhaps may be unknown to him.

Where one ſells ſheep, whereof the parſon is to have a rate Tithe, the ſeller and not the buyer muſt pay Tithe for them. Dr. and Student.

If one cut all the graſs on his ground, and put it in a rick there, and three months after, ſell it away, the ſeller and not the buyer muſt anſwer for the Tithe.

If a pariſhioner let or ſell his ground or herbage, the parſon may ſue either the owner of the ground, or the owner of the cattle at his election for the Tithe.

And it was held by the court, 1 *Roll. Abr.* 676. That if one agiſts the cattle of a ſtranger in his land, the parſon may ſue the owner of the land for the Tithes of the paſture, otherwiſe it would be very inconvenient for the parſon to ſue every owner of the cattle, and it would alſo be very difficult to know the number of the cattle which perhaps are uncertain.

And in the caſe of *Perry* v. *Wright*, *Hard.* 184, it was held by the court, that Tithes for the agiſtment of cattle are payable by the owner of the cattle: For the cattle take the profits and herbage of the ſoil. But the chief baron ſaid, that the owner of the cattle might pay them, but clearly the agiſter is compellable to pay them.

And in *Jon.* 254, the court held a ſuit brought againſt the owner to be well brought. But they determined, that it belonged to the ſpiritual court to determine, whether the one or the other ought to be ſued; and therefore as to this point a conſultation was awarded.

In the caſe of *Fiſher* v. *Leman*, where cattle where depaſtured in another man's ground occaſionally, it was argued by the whole court of exchequer, that the owner of the land, and not the owner of the cattle was to pay the Tithes: And Baron *Page* ſaid, that as to what had been ſaid, that the demand might be either againſt occupier or agiſter, that could not be; for the ſame duty could not ariſe in two different perſons at the ſame time.

And this ſeems the better opinion, for the owner of the land being paid for the agiſtment

ment of the cattle, certainly receives the advantage from its produce, and he may be found, but there might be great difficulty in finding the owner of the cattle, who very probably may reſide in another pariſh at a great diſtance.

If cattle, *&c.* be pawned or pledged, 'tis ſaid, that he to whom they are pledged muſt pay the Tithe. Boh. 158.

But if goods are delivered to a perſon to be re-delivered to the owner, then the owner of the goods muſt pay the Tithe: Ibid.

That Tithes may not be loſt to ſucceſſors, it is enjoined by a conſtitution of Archbiſhop *Winchelſea*, that the rectors and vicars of churches, who reſpecting the fear and favour of men more than the fear of God, and ſhall not demand their Tithes with effect, ſhall be ſuſpended, until they pay half a mark of ſilver to the archdeacon for their diſobedience. Lind. 191.

Bohun 159, ſays, if a pariſhioner die before he pay his Tithes, his executor, if he hath aſſets, muſt pay them.

Bohun ſays "Quære, if the heir be bound in the caſe of predial Tithes?" This quære ſeems to me without foundation for the exe-

cutor is intitled to the corn, &c. ſown at the death of the tenant for life, and not the heir, and as to any Tithes which may be in arrear at that time, the parſon, &c. having no lien upon the land for them, clearly the heir is not liable to the payment of the debts of the tenant for life, and therefore the only remedy the parſon, &c. can have, muſt be againſt the executor and not the heir.

Co. Lit. 55.

All perſonal Tithes being payable by cuſtom, are to be paid by ſuch as have been uſed to pay them.

But according to the canon law, no perſonal Tithe is to be paid of unlawful gain, until the perſon has repented him of his ſin.

And in ſome caſes the parſon ſhall pay Tithes to the vicar, and in others, the vicar to the parſon.

2 Roll Abr. 335.

And Tithes muſt in ſome caſes be paid of part of the parſon's income, for as appears, 1 *Roll Abr.* 655. if a parſon ſows his glebe, and afterward leaſes over the land, and the leſſee ſevers the emblements, he ſhall pay Tithes for them to the parſon.

2 Bulſt. 184. Cro. El. 578, 579. Moor. 910, 475. Hetl. 31. Noy 132. Savil 3. Palmer 38. Dyer 34.

And if a parſon ſows his glebe, and dies before ſeverance, and after a ſucceſſor is inducted

ducted, and then the executor or his vendee, ſevers the emblements, the ſucceſſor ſhall have Tithes of them, For though the executor repreſents the perſon of the teſtator, yet he cannot repreſent him as parſon, forasmuch as another is inducted. 1 Roll. Abr. 655.

This was doubted in *Hob.* 188. But in 1 *Brownl.* 69, the court determined according to it.

And if a parſon ſows his glebe, and is depoſed before ſeverance, and another is inducted, it ſeems he ſhall have the Tithe of his predeceſſor. 1 Bulſt. 184.

And in ſome caſes the king's leſſee or patentee of lands diſcharged of Tithes, ſhall yet pay Tithes, notwithſtanding ſuch diſcharge; as in the caſe of the Earl of *Hertford* v. *Leach.* In a prohibition, the plaintiff preſcribed, that King *Edward* 6, was lately ſeiſed of the foreſt of *Savernack* in *Wiltſhire*, whereof 20 acres of wood called *Wickham Huſſock* within the pariſh of *Pewſey*, and were a "*tempore, &c.* parcel· And that King *Edward* 6 and all his progenitors and predeceſſors, kings of *England*, were ſeiſed of that foreſt, and were exonerated and diſcharged from the payment of all and every kind of Tithes for the ſame whereſoever they might E. 11. Car. B. R. Intr. Hill, 8 Car. 1. Rot. 565. 1 Roll. Abr: 654. 1 Jon. 387. S. C.

might be due. And that king *Edward* 6, by deed inrolled, conveyed the ſaid foreſt to the Duke of *Somerſet* in fee, and that it was conveyed from him, by meſne conveyance to the plaintiff, (the now Earl of *Hertford*) in fee, and that the defendant being parſon of the ſaid pariſh, had ſued for Tithes of the ſaid 20 acres of wood. To which the defendant pleaded for a conſultation, that the ſaid twenty acres were not parcel of the ſaid foreſt; upon which an iſſue being joined, a verdict was given for the plaintiff.

And it was afterwards moved in arreſt of judgment, that this preſcription in *non decimando*, which was laid in the king, and his progenitors kings of *England*, was perſonal, and did not extend to the king's alienee, *&c.* and after ſeveral arguments at the bar, it was adjudged by the whole court, that the plaintiff could not take advantage of the preſcription; for the ground of this preſcription in *non decimando*, muſt be either becauſe it was a foreſt, and ſo could not render Tithes whilſt it was uſed with wild cattle, *i. e.* deer, *&c.* or becauſe the king is *perſona mixta*, and ſo might preſcribe in *non decimando* as a ſpiritual perſon; in all which caſes it could not extend to the king's alienee. For the ſaid foreſt being diſafforeſted, ſee *Cro. Car.* 20. *Hetl.* 60, *Still* 137, may now render Tithe in kind.

kind. And it ſhall not be intended that any real compoſition or conſideration was given for this diſcharge without ſhewing thereof eſpecially, no more than in caſe of a ſpiritual perſon or abbot, that makes ſuch a preſcription; and the court awarded a conſultation.

And ſo it ſeems in the caſe of the king's patentee of abbey lands, *&c.* For if a man preſcribes that ſuch an abbot and his predeceſſors have time out of mind held certain lands diſcharged of the payment of Tithes, and that this land came afterwards on the diſſolution by the *Stat.* 27. *H.* 8, to the crown, and ſo derives a Tithe to it from the crown; the patentee ſhall not have advantage of this preſcription, by the common law without the help of any ſtatute, becauſe it ſhall be intended, that this diſcharge was by reaſon of ſome perſonal privilege given to the abbot and his predeceſſors, and ſo is gone by the diſſolution of the body politic, (ſee 1 *Jon.* 3.) and not in reſpect of any real compoſition, as was adjudged in *Clark*, v. *Ward*, *E.* 7. *Car.* 1. and *M.* 10. *Car.* 1. *B. R. Siddown*, and *Holmes*, *per cur.* upon a demurrer. *Cro. Car.* 422. 1 *Jon.* 368, and 373, *S. C.*

And in the caſe of *Bolls* and *Atkinſon*,

1 *Lev.*

1 *Lev.* 185. In an action of debt upon the *Statute* 2 and 3 *Ed.* 6. *c.* 13. for not ſetting out of Tithes, on *nil debet* pleaded it was found, that the abbot of it was ſeiſed in fee, and that he and his predeceſſors, time out of mind, had held the ſame diſcharged of Tithes; and he granted the lands to *All Souls College*, in *Oxford*, *&c.* And it was adjudged for the plaintiff *per totam curiam*; for that this could not be intended a diſcharge by real compoſition, *&c.* it not being ſo pleaded, or found ſo by the jury, but that it was only a mere preſcription, and perſonal to the abbot and did not run with the land.

1 Sid. 320.
1 Lev. 189.
Skin. 51.
239.

It is ſaid 2 *Coke* 44. If a biſhop had held land diſcharged of Tithe, and had made a feoffment or leaſe of it, ſuch leſſee or feoffee ſhall not pay Tithe.

It is uſually ſaid, that at common law no lay perſon was capable of Tithe, but by way of diſcharge or compoſition with the vicar.

But now without queſtion, laymen as well as clergymen are capable of predial Tithes, and may have, receive, or retain them to their own uſe.

And

And in the caſe of *Benſon*, v. *Olive*, 1730. *Pengelly* chief baron delivered it as his opinion, that a lay impropriator is under no neceſſity of proving payment of Tithes unto him. Bunb. 274.

And in the caſe of Lady *Charlton*, v. Sir *Blundel Charlton*, Lord Chief Baron *Reynolds* Bunb. 325. declared it as his opinion, that there can be no preſcription in *non decimando* againſt a lay rector, any more than againſt a ſpiritual rector, and that they are equally entitled to Tithes of common right; and that it is ſufficient for a lay rector to ſet forth in a bill, that he is ſeiſed of the impropriate rectory; and if he maketh out his Tithe to that, it will be ſufficient, without putting him to the proof of having received Tithes. And to his opinion Baron *Comyns* ſeemed to aſſent, but he made a diſtinction between one who ſets up a Tithe to the rectory, and one who entitles himſelf only to the Tithes, or any ſpecies of Tithes within a pariſh; for in this laſt caſe the plaintiff ſhall be held to ſtrict proof, not only of his Tithe, but alſo of a perception of all the Tithes he ſets up a title to; and in this preſent caſe the plaintiff having ſet forth a title in Sir *Francis Charlton* (under whom ſhe claimed) to all Tithes in the pariſh of *Luckford* (except ſuch ſmall Tithes as the vicar uſually received)

received) and not to the rectory, and the defendant denying the plaintiff's title to the herbage, and the plaintiff not being able to prove any herbage Tithe ever paid, the bill was diſmiſſed.

And in the caſe of the corporation of *Bury*, v. *Evans*. It was determined that there can be no preſcription in *non decimando* againſt a lay impropriator; and that the preſumption which aroſe from a conſtant *non* payment will not be ſufficient, unleſs the defendant can ſhew, either that the lands were parcel of one of the greater abbies, diſſolved by the 31 *H.* 8. or that ſome of the impropriators had releaſed the Tithes.

Com. 643.
Bunb. 345.
S. C.

And in the caſe of *Payne*, v. *Brigham*, 36 and 37, *Car.* 2. and 1 *Jac.* 2. in *B. R.* It was ſaid that though it be generally ſaid, that of common right Tithes are due or payable only to ſpiritual perſons, or to mixt perſons, (as the king); it was determined that a mere layman may well alledge a ſeiſin in fee of Tithes, though he cannot recover thereupon without ſhewing he was ſo ſeiſed.

Nelſ. Lut. 418.
3 Cro. 437.
2 Mod. 320.
Poll. 623.

And 4 *Cro.* 79. Laymen as well as clergymen are capable of predial Tithes, and may

may have, receive, or retain them to their own uſe.

But perſonal Tithes are always to be paid to the parſon or vicar of the place, where the perſon, that is to pay the ſame, doth dwell.

Tithes muſt be paid to him that hath a right to them, be he a layman, as the impropriator, or clergyman, as the parſon or vicar.

The Tithe is generally paid to the parſon or vicar of the pariſh where it ariſes, and not to the parſon or vicar of another pariſh.

And yet by a ſpecial preſcription a parſon or vicar may have Tithe, or a portion of Tithe in a place out of his pariſh, and in another place.

And if one have Titheable cattle going in a waſte or common, whereof the pariſh is not certainly known, he ſhall pay Tithe thereof to the parſon where he dwells.

But in other caſes the Tithes that come out of any ground which is *extra* parochial, the king ſhall have them.

Where

Where beaſts or cattle go in one pariſh one part of the year, and in another pariſh another part of the year. The parſons of either pariſh ſhall have the Tithe for the reſpective time they fed in either pariſh; but if leſs than thirty days no Tithes is due.

This rule is to be obſerved though the cattle ſtrayed into ſuch other pariſh or otherwiſe.

Altough one be wrongfully collated by the biſhop, yet he is ſuch an incumbent as is capable of Tithes, and may ſue for them. Hob. 302.

Yet if a pariſhioner pay his Tithes to one that comes in by ſimony, it is at his own peril, and according to *Hob.* 168. he may be forced to pay them again.

If one be put into a benefice, and he is afterwards removed, and another put in, it is ſaid, he that was firſt put in ſhall have the Tithes that happen during the vacation time.

And in *Moor's* caſe, 18 *Jac.* 1. It was held that on death, reſignation, *&c.* the ſucceeding parſon is to have the Tithe happening

pening in the time of vacation; but they that gather it in, may keep ſo much thereof in their hands as to pay them their charges in collecting, and for miniſters ſerving the cure.

And in 1 *Roll. Abr.* 656. 2 *Bulſt.* 184. It is ſaid, that if corn be ſevered, and the parſon dies before it be carried off the ground, there it is thought the ſucceſſor ſhall not have the Tithes of the corn ſo ſevered, though ſtanding in rucks or ſhocks the ground. For in the like caſe the executors of the dying parſon, and not the ſucceſſor, ſhall have the Tithes of all corn within the pariſh, which are ſevered from the ground at the time of the parſon's death; and this, though the Tithes were not actually ſet out. For a right to the Tithes was veſted in the dying parſon, by the ſeverance of the corn from the ground.

A clerk or vicar of the pariſh, cannot preſcribe to have five ſhillings a year of the parſon, for the Tithes of a place in the pariſh; but upon a compoſition between the parſon and vicar, ſuch a preſcription may be good, for the rule is, "*Eccleſia decimas Eccleſiæ ſolvere non debet.*

A perſon may have his own Tithe of the parſon, by agreement between them either

during the parſon's life, or ſo long as both parties ſhall agree.

And in *Hetley* 31. It is ſaid, that if one contracts with the parſon for the diſcharge of the Tithes of his lands for years, and then demiſes his lands to another, in this caſe he ſhall not have Tithes of his leſſee, for that this contract for the diſcharge is fixt to the land, and the leſſee and other occupiers ſhall have the advantage of it. But if one take a leaſe of his Tithes by deed, and then demiſes his land, in this caſe he ſhall have Tithes of his leſſee, for the land was not diſcharged.

A parſon purchaſes lands within his rectory, and afterwards leaſes the rectory; the leſſee ſhall have the Tithes of the lands ſo purchaſed.

Glebe land in itſelf, it conſidered Titheable as other lands are, yet no Tithes ſhall be paid of the Glebe by the parſon of the church to the vicar of the ſame church, whilſt they are in the hands of the parſon himſelf, although the vicar is endowed of Tithes of all lands within the pariſh.

Moor. 475. S. C. And in a caſe 3 *Cro.* 479. It was held that if the vicar by endowment be to have all

all the ſmall Tithes within the pariſh, and then the parſon makes a leaſe of his glebe lands, the leſſee ſhall pay the ſmall Tithes ariſing thereof to the vicar, and the groſs Tithes thereof to the leſſor.

And if it be ancient glebe at the time of the endowment, and the vicar be eſpecially endowed of the minute Tithes of glebe lands of the parſonage, the vicar ſhould have them although they were in the hands of the appropriator. 3 Cro. 578. Moor. 910. S. C.

If a ſpiritual perſon hath a parſonage appropriate, and enfeoffs another part of the glebe, he ſhall yet have Tithes againſt his feoffment; becauſe the Tithes are only ſuſpended and cannot be extinguiſhed by any unity of poſſeſſion. Dyer. 43. Hetl. 31.

And if he demiſeth his glebe, he ſhall have Tithes of his leſſee. Ibid.

And in 2 *Bulſt.* 183. it is ſaid, that where a man being poſſeſſed of lands ſown with corn, ſells the corn to another, and afterwards becomes a proprietor of the Tithes of the ſame lands; he ſhall have the Tithes of the corn ſo by him ſold; for though the parſon may ſell the Tithes before ſeverance, and before the ſeverance hath ſuch an in-

tereſt and right in them, as he may alien or diſpoſe of, ſo that his property in them doth not ariſe to him merely by the ſeverance, the ſeverance giving unto him only the lay intereſt in them, yet before ſeverance they ſhall not paſs without expreſs words.

If the parſon or vicar's glebe be in another pariſh than where the church is to which it belongs, the Tithes of ſuch glebe ſhall be paid to the incumbent of the church where the glebe is, unleſs the parſon or vicar to whom ſuch glebe belongs, can preſcribe in *non decimando*.

Moor. 522.
1 Roll. Abr. 653.
Seld. 75. 76.

What is before ſaid of the parſon's glebe, with reſpect to the vicar, will equally hold hold true as to the vicar's glebe, with reſpect to the parſon; for whilſt the vicar retains the glebe in his own hands he ſhall not pay Tithes thereof; but if he demiſe it to another, the leſſee ſhall pay the great Tithes to the parſon, and the vicarial Tithes to the vicar.

And, as before obſerved, although generally ſpeaking, the Tithes within every pariſh do belong to the rector, vicar, or impropriator of ſuch pariſh, and ſhall be ſo intended if the contrary is not ſhewn, yet

may

may a portion of Tithes within one pariſh belong to the rector, vicar, or impropriator of another pariſh.

By a portion of Tithes, is to be underſtood where a parſon, rector, or other, has ſome part of the Tithes in another pariſh in groſs ſeparated and divided from the rectory of the pariſh wherein they ariſe.

The Tithes of cattle depaſtured on commons, or waſtes, where the pariſh is not known, are to be paid (as before obſerved) to the parſon of the pariſh where the owner inhabits.

CHAP. VII.

LANDS DISCHARGED OF TITHES.

What Lands were originally Discharged of Tithes at Common Law; also the Means whereby Abbey Lands became Discharged; with the Reasons and Authorities of each at large, &c.

CUSTOMS and prescriptions having been mentioned in the preceding chapters, it is intended in this to treat of them more fully, as well in cases *de modo decimandi* as *de non decimando*; and therein to shew the several ways and means whereby particular lands are discharged at the common law from the payment of Tithes. And first a word or two may seem necessary, in order to shew what kind of lands are, or have been, so discharged of Tithes.

Crown lands. By the common law none of the lands that were ancient demesnes of the crown, and whereof the king was seized *jure coronæ*, and

and not in his perſonal capacity, ought to pay any Tithes, while the lands continued in the hands of the king, his farmers or tenants.

For theſe lands having been *ab initio* appropriated ſolely to the ſupport of the crown in its politic right, were by our anceſtors, and with the beſt of reaſon, eſteemed in all reſpects as ſacred and unalienable as any lands given to the church or churchmen, and may as truly be denominated *terra dedita deo*.

Barren Lands

Of barren lands, heaths, commons, and waſte lands, according to *Bohun*, no Tithes are due by common right. For the rule is, *ubi non eſt annua renovatio, ibi decimæ ſolvi non debent*.

And this rule is ſo clear in the caſe of barren lands, or heath, or waſte grounds, *&c.* that the *Statute* 2 and 3 *Edw.* 6. *c.* 13. has provided, that although the ſame ſhould be improved and converted into arable or meadow, *&c.* yet no Tithes ſhould be paid thereof until ſeven years after ſuch improvement.

Wood Lands.

And for the ſame reaſons he ſays, that woodlands that were not *ſylva cædua* paid no Tithes at common law.

For, firſt, ſuch foreſts and woods being the proper nurſeries of timber trees, and conſequently of public benefit to the nation, it was held, that the public good ought not to be leſſened by the claim or intereſt of particular perſons eſpecially, for that the church in general, as well as the ſtate, were intereſted in the preſervation of thoſe nurſeries.

Secondly, There was no *annua renovatio*, and ſo thoſe lands not falling within that rule of Tithing, no Tithes could be paid for the ſame.

Abbey lands. Abbey lands do not ſeem to come under this deſcription, for they were not ſuch lands as were exempted either by their own nature, or from any public benefit that was intended to the nation in their original donation, being given as free alms only to particular orders or ſocieties of men, and thoſe not always eccleſiaſtics; and the only conſideration ever given for theſe lands were maſſes and ſinging *requiems* for the departed ſoul of the donor; and the infatuation of the times was ſuch, that it was ſuppoſed aliens could pray better than the natives of this country, and therefore the greater part of the Ciſtertian order were foreigners.

They

They having, *per fas et nefas*, obtained large endowments of lands upon their abbies, monaſteries, and houſes, were earneſt to increaſe the ſpiritual fund of this kingdom, and therefore endeavoured to get thoſe lands exempted not only from all ſecular duties, but alſo from all ſpiritual charges, and conſequently from the payment of Tithes.

The parliaments and the temporal powers looked with a jealous eye upon theſe encroachments, and were averſe to ſuch particular exemptions, whereupon they applied to the pope, and he, happy to increaſe his prerogative, and having no objections to the increaſe of his income, gave them thoſe bulls and papal grants which were the foundation of their being exempted from the payment of Tithes.

And therefore it clearly appears, that abbey lands, by the common law, were not diſcharged from the payment of Tithes.

Thoſe lands were diſcharged from the payment of Tithes by four ways or means:

Firſt, By bulls or grants of popes, or canons of council.

Second,

Second, By compoſitions real.

Third, By cuſtom or preſcription.

Fourth, By unity of poſſeſſion.

Each of theſe will be treated of in its order. And I muſt firſt obſerve, that no mention is made of any diſcharge by the kings or parliaments, for they well knew the impoſitions the ſubjects then laboured under from thoſe leeches, the foreign clergy, and therefore were unwilling to countenance any ſuch exactions!

Anciently there were many and large eſtates belonging to abbies, monaſteries, *&c.* which were either by the pope's bulls or canons, wholly exempted from paying Tithes, as all the lands belonging to the ciſtertian monks, and the præmonſtratenſes; and ſo were thoſe of the knight templars, and the knights hoſpitalers of the order of *St. John* of *Jeruſalem.*

The firſt exempting of abbots and priors aroſe from Pope *Paſchal*, who at the council of *Mentz* ordained that they ſhould not pay Tithes of lands in their own hands, (for before this time they paid Tithes the ſame as other men). This continued as a general

general discharge until the time of King *Henry* 2. when Pope *Adrian* restrained it to 3 orders only, *viz.* the cistertians, the templars, and hospitalers; and by a bull of Pope *Innocent* the 3d the præmonstratenses were discharged from the payment of Tithes, and they made up the four orders, which are commonly called the four priviliged orders.

But two of these orders being only a species of lay-brethren, as the knights templars and hospitalers, whatever exemptions they had for non-payment of Tithes, became in time a nuisance to the church, and were in effect depriving her of what she has since claimed *a jure divino*.

And by the second council of *Lateran* it was provided, that the privilege of the templars, *&c.* should not be extended to their farmers; and in the case of *Dickenson* v. *Greenhall*, 2 *Roll. Rep.* it was so adjudged.

By act of parliament in the 17th *Edw.* 2, the order of the templars was dissolved, and their possessions given to the order of *Saint John* of *Jerusalem*.

And

And in the caſe of *Henry* v. *Boyer*, *Rep. canon* 402, and 2 *Brownl.* it is ſaid they had the privilege of thoſe lands being diſcharged from Tithes from *Rome*, and that it was confirmed by divers councils and canons.

In *Noy.* 97. 1 *Jon.* 6 and 368. and *Hob.* 295, it is ſaid, that no diſcharge of abbey lands, whether the ſame originally were by either of the former ways, *i. e.* bull or canon, compoſition real, or unity of poſſeſſion, can at this day be good, except it has been allowed by cuſtom or preſcription, or has the authority of ſome act of parliament to ſupport it; and it has been determined, that in the caſe of ſuch abbey lands as were diſcharged, or came to the crown by the ſtatute of diſſolutions, 31 *H.* 8. it will be ſufficient to ſay in pleading that they had been held Tithe-free time out of mind; and where it ſo appears, ſuch diſcharge, though originally made by the pope's bull or grant, or by the canons or conſtitutions of a council, *&c.* will be allowed for good at this day.

If an abbot or prior were ſeized of abbey lands diſcharged of Tithes by ſtatute, he that is now farmer or occupier of ſuch lands ſhall be admitted to preſcribe in *non decimando*, by the *ſtat.* 1 and 2. *Edw.* 6. which enacts,

enacts, "that none pay Tithes otherwiſe "than they were paid for forty years be-"fore;" which words ſeem to have reduced all other methods to mere cuſtom and preſcription. Moor. 219.

But according to 3 *Keb.* 45, 217. *Raymond* 225. 2 *Roll. Abr.* 269, no abbot or prior could make ſuch preſcription whoſe houſe was not founded before time of memory: *i. e.* 1 *R.* 1. or *A. D.* 1120. for that is the time of limitation of all preſcriptions at the common law.

It may here be obſerved, that ſuch diſcharges from the payment of Tithes by the pope's bull or grant were long ſince grievouſly complained of both by the clergy and laity of this kingdom, as appears from many inſtances in our hiſtories and records. As *Matt. Paris*, and *Prynne's* hiſtory of King *John*, *&c.*

At length the practice of purchaſing ſuch bulls was reſtrained by the 2d *H.* 4. *c.* 4. which enacts thus: "Foraſmuch as "our lord the king, upon grievous com-"plaint made to him in this parliament by "the commons, hath perceived that the "religious men of the order of *Ciſteaux*, in "the realm of *England*, have purchaſed "certain

" certain bulls to be quit and diſcharged " to pay the Tithes of their lands, tene- " ments and poſſeſſions let to farm, or " manured or occupied by other perſons " than by themſelves, in great prejudice " and derogation of the holy church, and " of many liege people of the realm; our " lord the king willing thereupon to or- " dain and remedy, by the advice and " aſſent of the lords ſpiritual and tem- " poral, and at the inſtance of the ſaid " commons, hath ordained and eſtabliſhed, " that the religious perſons of the ſaid " order of *Ciſteaux* ſhall ſtand in the ſtate " that they were in before the time of ſuch " bulls purchaſed.

" And that as well they of the ſaid order, " as all other religious and ſeculars, of " what eſtate or condition they be, which " do put the ſaid bulls in execution, or " from henceforth do purchaſe other ſuch " bulls of new, or by colour of the ſame " bulls purchaſed do take advantage there- " of in any manner, that proceſs ſhall be " made againſt them and every of them, " by garniſhment of two months, by writ " of *præmunire facias*; and if they make " default, or be attainted thereof, then they " ſhall incur the pains and forfeitures con-

" tained

" tained in the ſtatute of proviſors, made " in the 13th year of the ſaid King *Richard*."

And by an act made in the 7th year of the ſame king, *c.* 6. it was enacted, " That " no perſon, religious or ſecular, of what " eſtate or condition that he be, by colour " of any bulls containing ſuch privileges " to be diſcharged of diſmeſs, pertaining " to pariſh-churches, prebends, hoſpitals, " or vicarages, purchaſed before the firſt " year of King *Richard* the Second, after " the conqueſt, or ſithence not executed, " ſhall put in execution any ſuch bulls ſo " purchaſed, or any ſuch bulls to be pur- " chaſed in time to come. And if any " ſuch religious or ſecular perſon, of what " eſtate or condition he be, from hence- " forth, by colour of ſuch bulls, do trou- " ble any perſon of holy church, preben- " daries, wardens of hoſpitals, or vicars, ſo " that they cannot take or enjoy the diſmes " due or pertaining to them of their ſaid " benefices, that then ſuch diſturbers ſhall " incur the like proceſs and pain as is or- " dained by the ſtatute made againſt them " of the order of *Ciſteaux*, in the ſecond " year of the reign of our lord the king " that now is."

By

By which *ſtatutes* it appears, that as the lands of churches, &c. founded ſince the firſt year of king *Richard* the firſt as aforeſaid, cannot plead preſcription for any abſolute diſcharge of Tithes; ſo neither by reaſon of theſe *ſtatutes* can any pope's bulls, purchaſed before 1 *Rich.* 2, or afterwards, be pleaded as an abſolute diſcharge. *viz.* not only for the owners, whilſt occupied by themſelves, but alſo for their farmers, tenants, or occupiers, whether the eſtate was belonging to any religious perſons, or did, or doth at this time belong to any of the ſecular clergy.

Having conſidered, how far abbey lands were diſcharged from the payment of Tithes by popes bulls and grants, we muſt now proceed to conſider how they are diſcharged by real compoſition.

And it ſeems, that a real compoſition if it can be ſhewed, may be a ſufficient diſcharge of the Tithes of ſuch lands, provided it was made ſince the ſaid *ſtatute*, or ſince the time of limitation of preſcription; and alſo provided it was made before the *ſtatute* 1 *Eliz.* where they belonged to any college, dean, dean and chapter, arch-deacon, prebend, parſon, vicar, &c.

And

And further, as to diſcharges by real compoſition, we may obſerve, that Tithes *de jure communi* are not to be paid, either of the earth or of the land itſelf, nor of houſes or habitations, *&c.* erected upon the land, or fixed thereto. But by cuſtom, Tithes may be paid thereof.

A real compoſition is, when an agreement is made with the parſon or vicar, together with the aſſent of the patron or patrons and ordinary, that certain lands ſhall for the future be diſcharged from the payment of Tithes in ſpecie, by reaſon of a recompence agreed to be paid, or made, to the parſon, *&c.* in reſpect thereof in money, either as an entire ſum, or as a yearly payment, or by ſettlement of lands upon the incumbent and his ſucceſſor for ever, or by doing ſome other thing that will be of ſome advantage to the parſon or vicar, to whom of right the Tithes do belong. And by the regiſter of writs, folio 38, it appears, that lands might anciently be diſcharged from the payment of Tithes by ſuch compoſitions.

Dr. & Stud. lib. 2. c. 45. March 87. 1 Jon. 368. F. N. B. 44.

But *Hob.* 176, ſays, that ſuch compoſitions to make them binding, muſt be made by deed under hand and ſeal, or by fine in the king's courts.

And it ought to be by apt words; for otherwiſe it will not be a ſufficient real compoſition to bind the ſucceſſors, and notwithſtanding the biſhop's confirmation, it ſhall ſtill remain as a perſonal argreement only, binding and obliging the parties thereto, and ſhall not be extended to the ſucceſſors.

March 87.

And a compoſition made with the parſon or vicar, without the patron or ordinary, will bind only for the parſon's life and during his incumbency.

Rep. Can. 392.

This compoſition is either between the parſon and his pariſhioner, or *inter clericos*; if it be between the parſon and his pariſhioner as to Tithes paſt, the compoſition is good though it be without any conſideration at all. But if it be touching Tithes to come, it may be good as to payment of Tithes only in part, but cannot be good as to a non-payment of all Tithes; nor is it good in part, *&c.* without the biſhop's approbation and confirmation.

And if the compoſition be *inter clericos*, and the Tithes be perſonal Tithes, it will not hold good; but if they be predial Tithes the compoſition will hold good, if the approbation or confirmation of the biſhop of the dioceſe be had thereto.

And

And by the ſeveral *ſtatutes*, paſſed relative to the payment of Tithes, it appears, that a compoſition may avoid the payment of Tithes in kind. And if it be made with a parſon or vicar to pay a *modus decimandi*, which hath continued time out of mind; here cuſtom being equivalent to law, makes it good, and it ſhall bind the parſon and his ſucceſſors. ibid.

But a *modus* on a park not time out of mind, *&c.* is properly no *modus*, but may be refuſed by the preſent incumbent. For a *modus* cannot begin at this day, but muſt be by preſcription; yet a compoſition (perſonal) may be made, which ſhall bind, during the life of him that made it. March 87.

And a real contract or compoſition, although it be made between ſpiritual perſons, is only determinable at common law.

And it is ſaid, that after a compoſition is duly and firmly made, if the lands be granted or transferred to another, the feoffee or grantee ſhall have the benefit thereof. 1 Jon. 268.

In the caſe of *Ingoldſby* v. *Wyvell*, *Hard.* 381. It was found by ſpecial verdict; that the abbey of *Fountaines* of the order of *Ciſtertians*, was before the council of *Lateran*

ſeiſed of the grange of *S.* within the prebend of *R.* and that between the years 1216, and 1261, a compoſition was made between the abbot and convent, that they ſhould for ever be free from the payment of any Tithes of the lands they tilled at their own charge within the ſaid grange, *A. D.* 1216; and that they ſhould pay Tithes for all other lands, there, and elſewhere; and that, *&c.* ſhould pay annually to the ſaid prebendary and his ſucceſſors, the ſum of five marks: And the ſaid verdict further found, that *A. D.* 1359, another compoſition was made betwixt them, reciting the former (but they did not find that it was confirmed by the patron and ordinary) and by this latter compoſition, the prebendary and his ſucceſſors were to have their election for all times to come, yearly; either to receive Tithes in kind of corn or grain, ariſing within the places aforeſaid, as well of lands in the hands of the abbot, as in the hands of the Tenants, or elſe five marks to be paid in lieu thereof, ſo as ſuch election was notified to the abbot, or any of the monks, *&c.* in the preſence of a proctor and two good men; and when notice was ſo given, the prebendary was to be content with the five marks, *&c.*

The court was of opinion, that the ſecond compoſition did not affect the ſucceſſors of the prebendary, and therefore the abbot was not

not bound by it. And the reaſon why the ſucceſſors of the prebendary were not bound, ſeems to be, becauſe by the firſt compoſition the prebendary was only bound, ſo long as they remained in his own poſſeſſion, *&c.* and by the ſecond compoſition, the five marks go in recompence of all, whether in his own poſſeſſion, or in the hands of tenants. Secondly, the court held, that the power of election was gone, becauſe it cannot be made according to the compoſition; and that therefore the firſt compoſition ſhould ſtand, *quoad* the lands in *propriis manibus*; and for the other Tithes in kind, may be taken as before; and judgment was given accordingly.

By the *ſtatute*, 1 *Eliz.* archbiſhops and biſhops; and by 13 *Eliz. c.* 10. all collegiate and other eccleſiaſtical corporations aggregate or ſole, are reſtrained from making any grants, other than for twenty-one years, or for three lives with other qualifications, *&c.*

In *Hilchcock's* caſe 17 *Car.* 1. B. R. it was as follows; a vicar contracted with a pariſhioner by theſe words, "*inter ſe convenerunt*," the one to take and the other to pay, ſo much for increaſe of Tithes; and the biſhop confirmed this as a real compoſition, being Leon 128.

for the advantage of the church; the vicar died and his ſucceſſor ſued for a performance in the ſpiritual court, and in this caſe a prohibition was granted, and it was held to be no real compoſition, (although the biſhop called it ſo) but only a perſonal agreement. And it was ſaid, that ſuppoſing it had been a real contract, and made between ſpiritual perſons, and only concerning ſpiritual things, that yet it was ſuable only in the courts of common law, and ſhould not bind the ſucceſſor of the one or the heir, *&c.* of the other.

Parſon's Law 252. And in *Snell* and *Bennett*, the caſe was thus: a parſon did covenant with *A.* his executors and aſſigns, that for ten ſhillings to him paid every year by *A.* his executors, or aſſigns, that he, his executors and aſſigns, ſhould be quit of the Tithes of ſuch lands during the life of the parſon.

A. paid the ten ſhillings yearly, which the parſon accepted; and afterwards *A.* died, leaving an infant his executor; adminiſtration "*durante minore ætate*," of the infant was committed to another, who leaſed the lands at will.

The parſon libelled in the ſpiritual court for Tithes in kind of the land; and the court

court of king's bench, upon motion, *&c.* awarded a prohibition and adjudged. That the agreement and compoſition did bind the parſon during his life. That although the aſſignee could not ſue the parſon upon the contract; yet he ſhould have a prohibition to ſtay the parſon's ſuit in the ſpiritual court, that the parſon may have his remedy here for the ten ſhillings yearly, upon the contract; for that he could not have Tithes in kind on account of the compoſition.

And where the parſon libels againſt his own agreement, that is ſufficient cauſe for a prohibition.

And a parol grant from the parſon to his pariſhioners, that they may have their Tithes by way of retainer was held good. But if the agreement had been to have or retain them, as long as the parties ſhall live, would be void, and it was ſo determined in *Tanner* and *Small's* caſe, *Yelv.* 94. 95. 2 Cro. 417.

And in a caſe cited in the caſe of *Legg*, v. *Studwick*, *Salk.* 414. A compoſition had been agreed upon between the parſon and his pariſhioners for Tithes, "*quamdiu ambubus partibus plaucuerint.*" And it was held, that if the pariſhioner ploughs and

ſows, the parſon ſhall not that year recede, and demand Tithe in kind, but make his election at the beginning of the next year; for the pariſhioner would not perhaps have ſowed his land, but that he relied upon the contract.

Every *modus decimandi* is by preſcription, ſo they muſt be intended to commence upon ſome compoſition or agreement, at the firſt made for a valuable conſideration, with the parſon or vicar, *&c.*

And in the caſe of *Nowel*, v. *Hicks*, 2 *Inſt.* 653. it was adjudged, that although Tithes in kind have been paid for twenty or thirty years together, yet ſuch payments ſhall not deſtroy a *modus*. And *Fitz, tit. judgment*, 133, 155. When a cuſtom creates an inheritance, it cannot be waived or annulled by payment, or other matter in *pais*.

And there is no queſtion to be made but that a compoſition to pay a *modus decimandi*, which hath continued time out of mind, cuſtom being the *lex loci*, is good, and ſhall bind the parſon and his ſucceſſors, and more eſpecially when it is confirmed, as this is by ſeveral ſtatutes made relative to the payment of Tithes.

And

And upon this principle neither a *modus decimandi*, nor real compoſition can begin at this day, but muſt be by preſcription.

Yet a compoſition or agreement may at this time be made to accept of money, or other things in lieu of Tithes for life, or years, *&c.* or in ſhort, *quamdiu ambabus partibus placuerint.*

And if any parſon or vicar, doth make ſuch compoſition for the binding of himſelf only during his time, he ſhall not be bound thereby, but only whilſt he is reſident and ſerving the cure without being abſent therefrom, by the ſpace of eighty days in the whole year.

And ſuch compoſitions are denominated perſonal agreements.

Thus all real compoſitions, as well as bulls, grants, canons and eccleſiaſtical conſtitutions ſeem now reſolved into the general rule of preſcriptions, *i. e.* not to be of any force, but where they have been uſed, time out of mind.

The diſtinction between a cuſtom and preſcription is, (as before obſerved) that a cuſtom relates to a whole diſtrict, or place,

as

as a county, hundred, town, or the like. A preſcription relates only to a particular perſon, family, or eſtate; and made in the name of a certain perſon, or his anceſtors, or thoſe whoſe eſtate he poſſeſſes. But a cuſtom is always local or alledged in no certain perſon, but only, that within ſuch a hundred, manor, *&c.* there is ſuch or ſuch a cuſtom.

And it may alſo be further obſerved, that preſcription is ſometimes called a public privilege, and cuſtom may well be denominated private common law or *lex loci.*

And either cuſtom or preſcription will ſupport a *modus decimandi* or a *non decimando.*

And by 1 *Roll. Abr.* 653. it appears that either a cuſtom or preſcription *de modo decimandi,* is good, and the ſame as to *non decimando.* For inſtance, it is admitted that ſpiritual perſons may well preſcribe in *non decimando,* and ſo may their farmers and tenants, and hence it is, that a parſon in one pariſh having glebe in another may preſcribe in *non decimando* for ſuch glebe.

And by the ſame author, a biſhop may preſcribe in *non decimando,* ſo as to be diſcharge

charged of Tithes for himſelf, his farmers, and tenants at will; the ſame point came again in queſtion, and a prohibition granted accordingly in another caſe.

And in the caſe of the Biſhop of *Lincoln*, v. *Cooper*, though it appeared that in the time of *Edward* 6. the manor was granted to the Duke of *Somerſet* in fee, and after regranted to the biſhop, yet it was held that the preſcription *de non decimando* was not deſtroyed. 2 Danv. 619.

But if the king has lands diſcharged of Tithes by preſcription, and he aliens them, the preſcription is deſtroyed, though the lands come to the king's hands again by eſcheat or otherways. Hard. 314.

By *Winch* 65. a dean and chapter may preſcribe in *non decimando*.

When lands are ſo diſcharged from the payment of Tithes by preſcription in *non decimando*, in the hands of a ſpiritual perſon, if he leaſes it for years to a layman, ſuch leſſee may alſo preſcribe in *non decimando*, becauſe the lands are diſcharged in fact. Cro. El. 475. 511. 512. Moor. 219. 598. Hob. 42.

And the copyholders of inheritance who hold of a biſhop, *&c.* as of his manor, may preſcribe

preſcribe that the biſhop and his predeceſſors, ſeized of the ſaid manors for themſelves and their tenants for life or years; and tenants by copy of court roll of the ſaid manor, time out of memory, *&c.* have been diſcharged of the payment of Tithes for their lands, parcels of the ſaid manor. For this is a good preſcription, and the copyholders ſhall be diſcharged of Tithes thereby; for their tenements are parcels of the demeſnes of the manor, and this might commence upon a real compoſition for the whole manor; and to this effect are the ſeveral authorities following, *viz.* 1 *Roll. Abr.* 653. *Cro. El.* 704. 784. *Moor.* 844. *Yelv.* 2. *Noy.* 132.

And although it is ſaid laymen at the common law were not entitled to Tithes in permanency, yet it is admitted, that at common law they were capable of a dicharge of Tithes in their own hands, with conſent of the incumbent, patron and ordinary, *i. e.* by grant or compoſition.

Bro Diſmes, 93, &c. 8 E. 4. 14. Reg. 38.

And it cannot be doubted but a layman can preſcribe *de modo decimandi.*

In *Pigott*, v. *Simpſon*, 3 *Cro.* 763. A layman had preſcribed, that he and all thoſe whoſe eſtate he had in the manor of *B.* time out

out of mind had uſed, in reſpect of the ſaid penſion ſo paid to the parſon, to have the tenth part of all the corn within the ſaid manor, or any other part thereof, or of all the lands holden within the ſaid manor; and ſuch preſcriptions are allowed to be good, for it ſhall be intended that at the beginning, the lord had all the lands and Tithes in his own hands, and afterwards gave the tenancies to hold of him retaining the Tithes. So that now he takes only the Tithes by retainer, which he had before in his own hands.

And *Winſcomb's* caſe 3 *Cro.* 293. the preſcription there ſeemed to be of this kind, for the lord to have the tenth ſhock of corn from his tenants; there is this reaſon alſo given, *viz.* becauſe he has it not as Tithes but as a parcel of his manor, and as a thing appurtenant thereto; for though it is ſaid, a layman by the common law could not have Tithes, *quia ſacra et dedita deo.*

Yet it was allowed he might have the tenth ſhock or ſheaf of corn, *&c.* as a temporal profit appender, and ſuch tenths might well be and paſs as parcel of a manor.

And for the ſame reaſon it is, that a layman cannot preſcribe to have *decimas garbarum*,

barum, or Tithes of ſheaves of corn; but it is admitted that a layman may have *decimam garbam*, or the tenth ſheaf of corn.

3 Cro. 293. 599.

Upon the above principle of a layman being entitled to the *decimam garbam*, it is to be underſtood as a lay fee to be taken after the parſon's Tithe ſet forth, *&c.* and is not to be intended the Tithes. For I ſhould conceive that in ſuch caſe the land notwithſtanding ſuch preſcription, ſhall be liable to pay Tithes to the parſon or other proprietor of the Tithes of the pariſh where the lands are.

And according to 1 *Roll. Abr.* 657. A layman at this day may have a portion of Tithes within a pariſh by grant from the crown, laying a preſcription, or unity of poſſeſſion, time out of mind, *&c.* in ſome of the diſſolved religious houſes, who were ſeized of ſuch portion of Tithes, and which by the diſſolution of monaſteries, *&c.* came to the crown, and was granted by the king to ſuch laymen, who claimed by or under ſuch grant.

In 3 *Cro.* 587. The caſe was as follows: that one being a layman was ſeiſed of the manor of *D.* and that he and all thoſe whoſe eſtates he had, time out of mind, *&c.*

had

had uſed to have the Tithes within the ſaid manor, and that therefore he and all thoſe, whoſe eſtate he had, time out of mind, &c. uſed to maintain a chaplain in the church.

And a prohibition having been granted upon the above ſuggeſtion a conſultation was prayed.

Firſt becauſe it was not alledged, that the church of *A.* was within the ſame pariſh. where the manor was; and ſo it was no conſideration to the parſon, that was the plaintiff.

Secondly, becauſe it doth not extend to the maintenance of the chaplain ſo long as he claimed the Tithes, time out of memory, &c.

Thirdly, becauſe the defendant had not proved the maintenance of the chaplain within the ſix months, but only the reſidue of his ſuggeſtion, this being the principal matter to make this good.

And a conſultation was awarded *per curiam* upon this laſt exception; and it ſeems the opinion of the court was, that if the ſuggeſtion of maintaining the chaplain had been proved, the preſcription would have

have been allowed as founded upon a good conſideration.

And as a manor may be diſcharged of Tithes againſt the parſon upon account of a penſion paid by the lord, or land ſo given, ſo may a whole pariſh, or hamlet, be diſcharged of this or that ſort of Tithe, as of wood, hay, *&c.* upon a cuſtom, that all the parſons of the church of *D.* time out of mind, have had ſuch lands, parcel of the manor of *H.* in recompence of this or that ſort of Tithe, within the ſaid pariſh or hamlet, although all the lands within the ſaid pariſh, *&c.* do not at this day belong to the ſaid manor.

2 Cro. 501.
3 Ibid. 736.

And in *Moor.* 911. It is ſaid to be ſufficient for the pariſhioners to alledge, that the parſons have had ſuch lands in recompence of ſuch Tithes not paid within memory, *&c.* And that it is not neceſſary to ſhew how or by what Tithe the parſon had the land; but if he had it in another manner than in ſatisfaction of Tithes, the parſon himſelf muſt ſhew that.

A cuſtom to be exempted from the Tithes of underwood uſed in a pariſh for fencing corn is good, but then you muſt ſhew that the

the Tithes of the corn are paid by you to the parſon. 4 Mod. 341. 344. 336. 340.

And in *Conyer's* caſe *Hutt.* 58, there was a preſcription to be diſcharged of all Tithes of hay ground, *viz.* of all the meadow in the pariſh, in conſideration that the parſon had certain acres of meadow to his own uſe. Here if any arable lands are converted into meadow the preſcription was held not to extend to them.

The repairing the body of the church is no *modus*, for thereby the parſon receives no benefit.

Therefore it muſt be generally underſtood, that every *modus* ought to be ſomething to the advantage of the parſon or proprietor of the Tithe.

And no *modus* can be made at this day but by act of parliament; an agreement by parſon, patron, and ordinary; confined and eſtabliſhed by a decree in equity, can only bind the parties thereto.

And in the caſe of the Attorney General, at the relation of John *Blair*, rector of *Burton Coggles*, in the county of *Lincoln*, and the ſaid John *Blair*, in his own right plaintiffs, June 17, 1765.

John *Cholmly*, Eſq. John *Hopkinſon*, George *Nidd*, and John *Lord*, Biſhop of *Lincoln*, defendants.

Lord Chancellor *Northington* ſaid, "this is an information brought by the Attorney General, at the relation of Dr. *Blair*, for an account and payment of Tithes in kind. The claim of the rector ariſes *de communi jure*.

"The defence ſet up againſt the claim, is firſt an agreement entered into in the year 1664. between the then rector, and the owners of the lands in the pariſh, for accepting a yearly rent of eighty pounds, in lieu of Tithes.

"But I am opinion, that the agreement on the face of it is unequal, as to the conſideration thereby agreed to be paid to the rector; for it appears that the agreement was entered into, in order to effectuate an incloſure of the open fields in the pariſh, and no conſideration is given, as to the future improvement of the lands by ſuch incloſure, of which the occupiers would reap the benefit.

"But I am clear of opinion, that even if the agreement was equal, it would not bind

the

the ſucceſſor in the rectory, but would be void as againſt him. The next defence ſet up againſt the plaintiff's claim, is a decree in 1677; which appears to be made in a cauſe inſtituted by conſent, between the ſame parties, that were parties to the agreement in 1664. for as to the biſhop of the dioceſe being a party, I conſider him as ſet up merely for form.

"And it is material to obſerve, that the parties themſelves did not conſider the agreement which had been executed as binding on the rector; for they conſidered the annuity of eighty pounds, as not being an adequate conſideration, for the rector's having given up his Tithe in kind; and therefore they entered into a new agreement of allowing him ſixteen pounds eight ſhillings and ſeven pence per annum, and on being allowed that addition, the rector by his anſwer conſents, to have the agreement eſtabliſhed.

"It is true that the decree founded on this agreement doth in *verbis*, bind the ſucceſſors in the rectory; but this was a decree founded on an agreement, which the court never entered into the propriety of, when a bill is brought by conſent of parties, and all ſuch decrees are drawn up by the regiſter of the

court, in the words of the agreement as a matter of courſe.

"But I am of opinion that ſuch decree cannot bind the ſucceſſor; the defendant's counſel have, it is true, cited caſes of a ſimilar nature; and urged the caſe of *Egerly* and *Price*, reported in *Finch's* reports, which I have looked into, and think it a very extraordinary one, for the judge to ſend to the parties to attend him. I can pay no credit to that caſe, nor do I look on it as any authority, but only the dream of ſome note taken in this court. The agreement and the decree being laid out of the caſe, the next conſideration is, whether a court of equity can relieve in the preſent caſe; and I am of opinion, there is not a better rule than "*equitas ſequitur legem.*"

"It is a fixed rule, that the church cannot be preſcribed againſt, the firſt on account of its high dignity; the ſecond on account of its imbecility, *quia fungitur vice minoris, conditionem ſuam meliorare poteſt, deteriorare nequit.*

"At common law, although the church could alienate with conſent of parſon, patron, and ordinary, yet it was under various reſtrictions. The patron muſt be abſolutely

ſolutely ſeiſed in fee ſimple; if he was ſeiſed of a fee ſimple only conditional, or baſe fee, the alienation was void. In the preſent caſe, the bar ſet up by the defendants amounts to a mode of alienation; and if the decree is void, as I am of opinion it is, what then is there to ſend to law, when the point is about the extent of a decree of this court? And if it were ſent thither, it muſt come back to be ultimately determined here. It has been alſo objected, that the length of time ought in this caſe to bar the plaintiff; but I think the legal rule, that no preſcription can run againſt the church, muſt be adhered to, and indeed the length of time this agreement was acquieſced under, is not ſo great as at firſt it appears; for the perſon who was rector in 1677, and party to the decree, and had a right to eſtabliſh the agreement during his life, did not die until the year 1718.

"Upon the whole, the incloſure of the lands was for the general benefit of the pariſh; and ſuch lands will be continually increaſing in value, while the compoſition given in lieu of Tithe will be gradually diminiſhing in value. The compoſition here regarded only the value of the paſt Tithes, without any regard to the future increaſing

value of Tithes, which is always allowed for in every private bill for an incloſure.

"If in the preſent caſe, the parties had made an allowance for the future improved value of Tithes, I ſhould not have been inclined to relieve, but would have left the rector to his legal remedy. I ſhall therefore decree, that the information as againſt the biſhop of Lincoln, be diſmiſſed with coſts; and let it be referred to the maſter, to take an account of the value of the Tithes which have accrued from the time of filing the information, and let what ſhall be coming on the balance of ſuch accounts be paid to the relator Dr. *Blair*; and no coſts hitherto, but I do reſerve the conſideration of ſubſequent coſts, until after the maſter ſhall have made his report, and any of the parties to be at liberty to apply to the court, as there ſhall be occaſion."

And it now ſeems fully ſettled that it is not neceſſary to ſhew, that the *modus* had at firſt a reaſonable commencement, for theſe *moduſes* having been from time immemorial, we muſt ſuppoſe they had a ſufficient foundation though at preſent it may not be diſcoverable, it is enough at this great diſtance of time, to ſhew that the parſon, patron, and ordinary, before the reſtrictive ſtatutes, might bind

bind the revenues of the parſon, and that all theſe *moduſes* muſt have had their commencement from an inſtrument ſigned by the parſon, patron, and ordinary. 2 P. W. 573.

In the ſame caſe, the court, ſaid there could be no colour to ſay, that becauſe ſuch inſtrument in ſo great a length of time had been loſt, that therefore the *modus* ſhould be loſt.

Yet that muſt be underſtood with this exception, for if the inſtrument which the parſon, patron, and ordinary, had given to a layman, owner of ſuch a farm, to diſcharge the farm of all Tithes (though this would be good while the inſtrument could be ſhewn) ſhould once be loſt, this being a privilege in *non decimando*, the privilege would be loſt by the loſs of the deed. Ibid. 574.

And in conſideration, that after the graſs was cut, the pariſhioner at his own coſts and charges, made the Tithe graſs into hay, by ſtrewing the graſs on the ground, (which is called tedding of it) and afterwards gathering it into wreaks, and windrows; and that therefore the pariſhioners were to pay no Tihes for the herbage of dry and unprofitable cattle. And it was proved, that the pariſhioners time out of mind, had paid no

Tithes of this herbage, yet there was no evidence that this excuſe for not paying Tithes of herbage, was in conſideration of the pariſhioner making Tithe graſs into hay, and this *modus* was held to diſcharge the occupier of the ſame land, wherein the pariſhioner made the Tithe graſs into hay from paying Tithes of the after herbage; but that it could not be a good *modus*, to excuſe the herbage Tithe of another land; for at that rate a man might mow and make into hay, only a ſmall parcel of ground, containing a quarter or half an acre of land, and by this means be excuſed from the Tithe herbage of a hundred head
2 P. W. 523. of cattle.

In the caſe before cited of the Archbi-
Salk. 657. ſhop of *York*, v. the Duke of *Newcaſtle*. The preſcription was to pay ten fleeces of wool and two lambs, in lieu of all Tithes. And *Price* and *Bury*, barons, were of opinion, that this was an ill *modus*; becauſe it is one ſpecies of Tithes for another; and there is great uncertainty, for one fleece may be twice as big and three times the value of another.

Ward, chief baron, and *Smith*, baron, were of the contrary opinion. For, firſt, a *modus* is nothing but a real compoſition for

for, or in lieu of Tithes, or an annual profit certain and permanent; and they held that the payment of one chattel for Tithe, was or might be a good *modus* as well as money; for why might not the perſon originally agree to take ten fleeces for his Tithe as well as a penny?

They admitted that payment of Tithes of one ſpecies, or payment of a *modus* for one ſpecies of Tithe, could not be a diſcharge as to another ſpecies; but they held that this was not a payment of Tithe, nor a payment for a ſpecies of Tithe; becauſe it was to be paid at all events, whether there be ſheep or not.

And they denied the caſe of 1 *Roll. Abr.* 651. and held it no more uncertain than to pay a *modus* of ten cheeſes, which may differ very much in nature, quantity, and value; and it tends to the diſquiet of the country to break in upon cuſtoms and uſages, and it ought not to be done but on plain and manifeſt reaſon.

And a *modus* ought to be as certain as the thing loſt or deſtroyed by it.

In the caſe of *Startupp* v. *Dodderidge*, a *modus* to pay 2s. in the pound of the improved Ibid.

proved rent was held naught, on account of its uncertainty.

Ibid. In the caſe of *Hill* v. *Vaux*, a *modus* to pay a whole meal's milk ſuch a day, and every ninth and tenth morning and night 'till after a young lamb was heard to bleat, in lieu of Tithe of milk, was held void, becauſe by this *modus* the parſon might have nothing: as, ſuppoſing a lamb be heard to bleat before the day fixed.

And a *modus* to pay 4s. for every day's ploughing of wheat, and 2s. for every day's ploughing of barley, was held void for the uncertainty, it not being averred how much
1 Keb. 612. every day's ploughing did contain.

And in the caſe of *Webber* v. *Taylor*, a bill was brought to eſtabliſh a *modus*, which was laid thus:---for payment of ſuch a ſum of money while the lands are in the hands of the proprietors; but if in the hands of any other perſon, to pay Tithes in kind, or the money at the election of the parſon. Lord Chancellor *King* ſaid, that he would never eſtabliſh a *modus* againſt a
Caſ. Cha. King 32. parſon without a trial at law, if he deſires it; but this *modus* is clearly ill, for a *modus* cannot be deſultory.

In

In the caſe of *Hardcaſtle* v. *Smithſon* and *Slater*, the bill was brought by the plaintiff, as impropriator of the rectory of *Coverham*, in *Yorkſhire*, (amongſt other particulars) for the Tithe of hay. 3 Atk. 245.

The defendants inſiſt that there are, and for time immemorial have been, ſeveral ancient uſages and cuſtoms within the ſeveral villages, that all and every the occupiers of lands and tenements therein, have uſed to pay yearly on *St. James's Day* to the impropriator of *Coverham*, certain annual ſums of thirty ſhillings, twenty ſhillings, (and ſo on) in lieu of all Tithe hay yearly happening within the lands therein ſpecified.

It was objected that this *modus* could not be good, for the uncertainty; for as it is laid, it may charge perſons with the payment of a *modus* for Tithe hay who have no hay to pay Tithe for, as perſons who have only houſes, wood land, arable land, and the like; and therefore it is to be preſumed, that no ſuch agreement between the parſon and pariſhioners was ever made.

Lord *Hardwicke* ſaid, if there were a violent preſumption of this kind, it might have weight; but he thought the preſumption

was

was not ſo ſtrong, becauſe the lands might be preſumed to be in the hands of one perſon at the time when the agreement was made; and if they were in the hands of ſeveral owners, they might probably all pay Tithe of hay, and therefore might agree that they would pay ſo much for the Tithe of hay, whether they ſhould have hay or not; for as they pay it at all adventures, they have the benefit of the *modus* when they have hay, and they may therefore have hay if they pleaſe.

As to the uncertainty of the perſons who are to pay the *modus*, as laid in the plea, it is well enough; for in ſuing for ſuch *modus*, it is not neceſſary for the plaintiff to make all the occupiers parties, who pay a joint *modus*; for every part of the land is liable, and no occupier can be diſcharged until the whole *modus* is paid; and therefore the eccleſiaſtical court would be juſtified in determining that every occupier is liable for the whole, and for each other, and therefore ſuing a part of the occupiers is ſufficient.

And the caſe in 1 *Roll. Abr.* 648, 651, the pariſhioner was to pay in *Lent* thirty eggs in lieu of all Tithe eggs. The court held

held this to be a good *modus*; for the parishioner is bound to pay them whether he has hens or not.

And a *modus* claimed must not be unreasonable.

As in the case of *Bawdry* v. *Bushel*:---The *modus* claimed was, that all persons having lands within such a town, but not inhabiting within the same town, shall pay fourpence an acre only, in satisfaction of all Tithes, was held an unreasonable custom: 1 Lev. 116.

For that it gave greater privileges to foreigners, not inhabiting within the town, than it did to the inhabitants themselves; which by reason of their residancy, are obliged to greater charges towards church reparations, ornaments, *&c.*

In the case of *Chapman* and others v. *Monson*, and *e contra*. The plaintiffs in the original bill were occupiers of meadow and pasture ground within the parishes of *Burgh* and *Winthorp*, in the county of *Lincoln*, but did not inhabit within either of the said parishes, and they brought their bill on behalf of themselves and others, occupiers of lands, and who did not inhabit within either

either of theſe pariſhes, to eſtabliſh a *modus* for Tithes.

The *modus* as laid was, that in the two pariſhes of *Burgh* and *Winthorp* the Biſhop of *Lincoln*, for the time being, was impropriator, and the defendant, Mr. *Monſon*, leſſee for three lives under the biſhop; the pariſhes were near the ſea, and conſiſted chiefly of marſh lands; and the *modus* as to the pariſh of *Burgh* was, that every perſon not inhabiting within the pariſhes of *Burgh* and *Winthorp*, occupying any meadow and paſture land within the pariſh of *Burgh*, had time out of mind paid to the appropriator of the pariſh, his farmer, or tenant, on every *Good Friday*, or as ſoon after as demanded, the ſum of fourpence per acre every year, as a *modus*, in ſatisfaction of all Tithes; and ſo proportionably for every greater or leſſer quantity.

And the ſame cuſtom was laid *(mutatis mutandis)* for the occupiers of meadow and paſture lands within the pariſh of *Winthorp*, not inhabiting within the pariſhes of *Winthorp* or *Burgh*.

The defendant, Mr. *Monſon*, demurred to the bill, as it appeared on the face of it to be unreaſonable, it favouring foreigners more

more than inhabitants, and for which was cited the (before mentioned) caſe 1 *Lev.* 116.

Lord chancellor took time to refer to the authorities till the next day, and then declared that he did not approve of the reaſon given in *Levinz*, that the inhabitants ought to be more favoured in the *modus* than the foreigners, for that all occupiers of land within the pariſh, whether reſiding in it or not, were liable to the repairs and veſtments of the church. And his lordſhip called the opinion in *Levinz* a ſudden opinion upon a motion, and would not allow the demurrer.

In *H. Ter.* 1729, this cauſe came on for hearing, and the lord chancellor (at his deſire) was aſſiſted by Mr. Juſtice *Reynolds* and Mr. Juſtice *Forteſcue*; and the cuſtom being well proved, the only queſtion was, whether the *modus* was good in law?

Againſt the *modus* it was inſiſted, that as Tithes are a revenue of common right belonging to the church, ſo every cuſtom derogating from that right ought to be taken ſtrictly; and that, according to this cuſtom, if an inhabitant of the pariſh of *Burgh*, occupying lands within the pariſh, ſhould take

take a houſe, or even a lodging in any neighbouring pariſh, except *Winthorp*, this would entitle him to the advantage of the *modus*. And the caſe of *Stebbs* v. *Goodlack*, in *Leon.* 99, was cited. The parſon of *Letcome*, in *Berks*, libelled in the ſpiritual court againſt the defendant for Tithes of corn; the defendant ſhewed a cuſtom in *Letcome*, that the parſon, as a *modus* for the Tithe of corn, ſhould have the tenth land ſown with corn, and ſhould begin his reckoning at the land which was next the church, and ſo the next year at the next land, *&c.* and inſiſted on this cuſtom; the parſon thereupon ſhewed that the defendant, the farmer, by fraud and covin, every year ſowed the tenth land very thin with corn, and never dunged or manured it, ſo that the other nine lands brought forth each every year thrice as much as the parſon's land; wherefore, in regard the defendant had abuſed the cuſtom, the parſon ſued for Tithes in kind. The farmer, at firſt, got a prohibition on account of the cuſtom, but the parſon afterwards had a conſultation. *Wray*, chief juſtice, ſaying this were a cuſtom againſt common reaſon. And 2 *Salk.* 656. and 1 *Lev.* 116. 1 *Keb.* 602. *Degge* 398. were cited againſt the *modus*.

For

For the *modus* it was urged, that it had been uninterrupted time out of mind, ſo that there might have been a purchaſer of part of this land, who has paid the dearer for it, from a dependance upon the *modus*, and conſequently, by ſetting aſide the *modus* the purchaſer would be injured. With regard to the fraud objected as incident to the *modus* in the principle caſe, that which every thing is liable to cannot be a good objection againſt any particular thing; for this fraud may be ſuggeſted in all *moduſes*, the land-owner might ſay to the parſon, "if you will not compound with me for "the Tithes, I will ſow the land, elſe I "will mow and uſe it for meadow, and "then you (the parſon) will not have the "Tithes, but the vicar." The caſe of *Colford* v. *Peaſe* was cited:—A cuſtom was, Cro. El. 136. that time out of mind every inhabitant of *Sale*, who occupied paſture lands in *Dale*, paid Tithes for thoſe paſture-lands to the vicar of *Sale*, and that the vicar paid 2d. for every acre to the parſon of *Dale*. The court held this a good cuſtom, though it depended on the uncertainty of an inhabitancy; and that the vicar of *Sale*'s paying 2d. per acre to the parſon of the other pariſh for this paſture, was the ſame thing as if this compoſition were paid by the occupier of the land itſelf, being equally beneficial. And

Godb. 194. *Brown*'s caſe was cited in ſupport of the *modus*.

The lord chancellor and two judges held this a good *modus*, and that the parſon had no right to object that the *modus* was not more extenſive, for that had been more to his prejudice, for in the preſent caſe he had Tithes in kind of the inhabitants; and as the *modus* for paying fourpence per acre for all the land in the pariſh (whether occupied by inhabitants or not) would have been good, *a fortiori*, this is good becauſe more beneficial to the parſon.

That in the preſent caſe there was no ground to inſiſt on the cuſtom being unreaſonable; for the Tithes are a reward for the trouble and care which the parſon takes of the ſouls of his pariſhioners, in which caſe the labourer is worthy of his hire; but then, as the parſon is not bound to go out of his pariſh to viſit thoſe who only occupy land within the pariſh, ſo it is but reaſonable, that they, who have not the benefit of the parſon's care, ſhould anſwer the leſs duty to him, and may well be excuſed upon a *modus* of fourpence an acre, which the parſon cannot ſay is too little. As to the caſe in *Levinz*, that was obſerved to be a ſudden opinion of the judges, and when, perhaps,

only

only the counſel that made the motion was heard.

The lord chancellor decreed that the modus ſhould be eſtabliſhed, and diſmiſſed Mr. *Monſon*'s croſs-bill for Tithes in kind without coſts, in caſe he ſubmitted to the decree.

In the caſe of *Gibbs* v. *Goodman*, it was ſaid by *Pengelly*, chief baron, that in an anſwer to a bill of Tithes, it was not abſolutely neceſſary to expreſs the day of payment of a *modus* inſiſted on, but this may be ſupplied by evidence, ſo as to be a foundation for the court to direct an iſſue at law to try the *modus*; but in a croſs-bill to eſtabliſh a *modus*, a day muſt be expreſsly alledged, otherwiſe it will be fatal. Bunb. 328.

And many *moduſes* have been ſet aſide becauſe the defendant did not ſet forth any particular day of payment. 3 B. E. L. 424.

And the reaſon upon which thoſe decrees were made, as ſtated by *Burn*, is, that Tithes in kind being a proviſion made by the law for the clergy, which become due at a certain and determinate time, and which if not then ſet forth, are immediately demandable, ſhall not be taken from them by an

uncertain payment, which becomes due on no particular day, and which they cannot know when to demand, or go about to receive, if withheld.

But by the later deciſions it ſeemeth now to be held, that where an annual *modus* hath been paid, and no certain day for the payment thereof is limited, that the ſame ſhall be due and payable on the laſt day of the year.

In the caſe of *Carte* v. *Ball*, *May* 13, 1747, a bill was brought for a ſubtraction and account of Tithes againſt the inhabitants and occupiers of *Hinckley*, in *Leiceſterſhire*.

The defendants inſiſted upon a contributory *modus* of 17s. in the whole, paid for the hides, in lieu and ſatisfaction of all Tithes: *viz.* 5s. 8d. for the part of hides in the occupation of ſuch a perſon; 4s. 4d. for the part in the occupation of another; and 7s. for the part in the occupation of another.

By Lord Chancellor *Hardwicke*, "two objections have been taken by the plaintiff, that it doth not expreſs the time when it is to be paid, nor enumerate the perſons by whom

whom it is to be paid. As to the firſt in the court of exchequer, if a particular time was not laid, that court formerly would have over-ruled the *modus*, and not gone into the merits; but latterly, they have very properly let in a greater latitude of proof; and it is ſufficient if it is laid at a particular time, or thereabouts. But the ſecond is what I lay ſtreſs upon, that it is not ſaid by whom it is to be paid; and I do not know any caſe in the books, or in experience, where it is not alledged to be paid by ſomebody, and it is very reaſonable it ſhould be ſaid by whom, becauſe the parſon may then be ſure to whom he muſt apply, or againſt whom he may have a remedy for his Tithes. This cannot be ſupplied by ſaying, that in other parts of the anſwer they have ſhewn the 17s. have been paid by thoſe perſons who have held theſe lands, for that may be accidental; and though it has been ſaid this court does not take cuſtoms ſo ſtrictly certain as courts of law, yet this court requires cuſtoms to be ſubſtantially laid. If before the court of exchequer, where caſes of this kind are more frequent, it would have been over-ruled at once." 3 Atk. 496, 1 Vez. 3. S. C.

In the caſe of *Richards* v. *Evans* and *e contra*, *Oct.* 26, 1747:—The plaintiff, as

rector, brought a bill for the payment of Tithes in kind; the defendant, as owner of the farm, brought a croſs bill for eſtabliſhing a cuſtomary payment of 7l. per annum, in lieu and ſatisfaction thereof.

It was inſiſted on behalf of the plaintiff, that this cuſtom was neither well laid or proved, nor was the day of payment certainly ſpecified, for want of which a *modus* was held not good in point of law in the exchequer, *Trinity Term*, 5 *G.* 1. becauſe the time of payment of a *modus* ought to be as certain as of the Tithe, in place of which it is ſubſtituted; which as to the fruits of the earth, is immediately on the firſt ſeverance; and a cuſtom uncertain is no cuſtom.

By the Lord Chancellor *Hardwicke*, "as to the general queſtion, whether it is neceſſary to lay and prove a particular day of payment? the caſe in the exchequer was certainly ſo determined; but I remember it gave general diſſatisfaction in *Weſtminſter-Hall* and abroad, as too nice to require the proof of a particular day; and it has been ſince adjudged to the contrary, that "on or about" is ſufficient; ſo that they have left off taking that exception in the exchequer."

1 Vez. 39.

And

And if a *modus* claimed appears to be made of late years, it will be ſet aſide.

As in the caſe of *Ekin* v. *Pigot*, *March* 3, 1745:---a bill was brought for Tithe in kind of the manor of *Dodeſhall*, in the pariſh of *Quainton*.

The defendant inſiſted upon a *modus* of 48l. in lieu of all Tithes of that manor.

For the plaintiff it was ſaid, that it was too rank; for the whole rectory was worth but 33l. per annum in King *Henry* the 8th's reign, and the whole demeſne lands of that manor in Queen *Elizabeth*'s time were worth but 48l. per annum, ſo that the *modus* then would have been juſt as much as the manor itſelf.

The plaintiff proved, as exhibits, the value of the firſt fruits from a return made by the augmentation office; and for the value of the manor, an inquiſition *poſt mortem*.

By the Lord Chancellor *Hardwicke*:— "There is no perſon more willing than I am to ſet aſide ſuch payments in lieu of Tithes; but there muſt be ſome ground of law upon which to ſupport ſuch payment."

The objection is, its being too rank a *modus*, and conſequently that it could not be time out of mind; for that it appears, that now that manor is but 80l. a year, and according to the natural improvement of lands from *Henry* the 8th's time, it ought to have been ten times as much, on account of money ſinking in its value, and lands riſing in their's. The returns from the firſt-fruits-office, and their inquiſition *poſt mortem*, though they were not concluſive evidence, yet are ſufficient upon the circumſtances of this caſe, becauſe the defendant has not produced any evidence to contradict it.

Taking all the evidence together, this appears to be nothing more than a compoſition upon agreement, which parſons have ſubmitted to in ſucceſſion from time to time, and is merely a perſonal payment, not a compoſition real, which is ſome charge given to a parſon upon lands, under a deed, to which himſelf, the patron, and ordinary are parties, and of a different nature from this.

3 Atk. 258.

In the caſe of *Chapman* v. *Smith*, *July* 17, 1754:---the bill was brought by the rector of the pariſh of *Atringham*, in *Kent*, for payment of Tithes in kind for land therein.

The

The defence ſet up in the anſwer was a *modus* in this pariſh time out of mind, that all occupiers of the marſh-lands in this pariſh have always paid, or ought to pay, yearly to the rector 9d. per acre, and no more, for every acre of marſh-land within the ſaid pariſh, and the Tithable places thereof in their reſpective poſſeſſions, except when ſown with corn, grain, flax, or planted with hops, as a *modus* in lieu of all Tithe of hay and paſture, and all ſmall Tithes except flax, hemp, and hops; and ſo after that rate for a greater or leſs quantity than an acre.

For the plaintiff, it was reſted on the rector's Tithe.

It was argued for the defendant, that this was a good *modus*, and well laid; and a caſe in the exchequer in 1726, where a bill was brought by *Richard Bate*, as rector of the pariſh of *Wareham*, the very next pariſh to this pariſh, for Tithes in kind; and a croſs bill by Sir *Charles Sedley* and others, inhabitants of that pariſh, to eſtabliſh a *modus* of one ſhilling for every acre of marſh-land, laying it exactly as the preſent *modus*; two iſſues were directed, and upon the equity reſerved after the trial, the *modus* was eſtabliſhed. This is a precedent both

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in law and equity, ſhewing this as a *modus* well laid, and that in a court were theſe kind of bills are particularly attended to; and anſwers the objection of being too rank, this being land only at 9d per acre. In *Evans* v. *Price*, 26 *Oct.* 1747, it was held, that the rankneſs of a *modus* is not to be judged by compariſon of the ſum to the rent reſerved on the land, but to the value of the land, and that where it was neceſſary in point of proof, the court would direct that matter to be tried, but otherwiſe the court itſelf would judge of it.

Theſe lands lie in *Romney* marſh; to preſerve which, the owners are at very great expence, and therefore it is probable that they made this compoſition, and then the variation of the land is not a reaſon to ſay, this is a rank *modus*, for the value of lands is uncertain and depends upon particular huſbandry. It is impoſſible to ſay, what the value of the lands was at the time of this compoſition; and it was reaſonable to think, that a proper valuation was then made and a proper reſervation. The alteration in different times, from the cheapneſs of money and value of land, would deſtroy all *moduſes* of this kind. There is no evidence of payment of Tithes in kind. This rector and his predeceſſors have agreed to this *modus*.

It

It was anſwered for the plaintiff, that he need only ſhew that he is rector; which by law intitles him *prima facie* to all manner of Tithes, unleſs ſome legal bar is ſet up, which here is a *modus* but it is neither proved in fact, nor good in law, and is contradicted by records. The objection to this *modus* is, that it is rank, and appears ſo large, that it is impoſſible it could be time out of mind. The court will always deſtroy ſuch a *modus* on the face of it, where it runs high, and goes ſo near the value of the Tithe in kind.

Every *modus* certainly preſumes an original agreement before the diſabling *ſtatutes* by parſon, patron, and ordinary; and ſince by parſon alone. That commencement muſt be preſumed conſiſtent with right reaſon; and the court will not preſume, that the pariſhioners (in whoſe favours all theſe contracts are) made ſuch a compoſition as was of more value than the Tithes. The payments muſt be always in money, this being paſture Tithe; which is always pecuniary, cannot be ſpecific, and the only Tithe in the kingdom which is not ſpecific.

It is not to be conceived, that 9d would be paid, if the real Tithe did not amount to half that. The value of an acre to ſupport this as a reaſonable compoſition at the time, muſt

muſt have been 7s and 6d. So high a *modus* creates a ſtrong preſumption, that it was not made beyond time of memory. The law fixes that to a certain period in the reign of King *Richard* the firſt, ſince whoſe death it is above 566 years. This then muſt be preſumed an agreement before that time to pay 9d an acre.

Theſe lands in the time of King *Henry* the eighth, were valued at two ſhillings an acre; as appears from ſeveral records, particularly from a ſurvey then taken, now produced out of the augmentation office.

The other objection, and which deſtroys the *modus* upon the face of it, is the exception of the Tithe of hops; which ſhews it a compoſition coming in Queen *Elizabeth's* time, though perhaps they exiſted here before, there being a *ſtatute* in the time of *H.* 8. prohibiting them as a venomous weed. It could not then be an agreement before time of memory. The exception muſt be taken entire with the *modus*; for the court never ſevers a *modus*, or conſiders one part as good, and another as bad. Hops being alledged as part of the deſcription, it is thereby as much *felo de ſe*, as if laid particularly and preciſely for hops, which is never allowed; and 2 *D. Ld. Raym.* 1163. *Bun.* 10. 78. 7 & 1 *Sid.* 443.

1 *Ven.*

1 *Ven.* 61, were cited as authorities for the plaintiff.

Lord Chancellor. "The court certainly ought to ſupport the rights of the church, and not to allow any *modus* or cuſtomary payment, that by the rules of law is not to be ſupported. At the ſame time, the court ought not, eſpecially in caſes of very extenſive conſequences, lightly to overturn and overthrow cuſtomary payments, that have prevailed for a great tract of years, which is commonly called time out of mind, or the memory of man: though I do not mean ſtrictly according to the notion of law before the time of the tranſportation of King *Richard* the firſt.

"I take it, that the queſtion before the court in this caſe is of very extenſive conſequence, through a great tract of country, it appears in this caſe, and in former caſes in *Weſtminſter* hall, that it extends and runs through ſeveral pariſhes in this country. And as that is the caſe, and no inſtance or tradition of payment of Tithes in kind, in this pariſh for a great tract of years, purchaſers have come in and paid a price for the land according to thoſe cuſtomary payments; and it would vary and alter the value of their property, to overturn or overthrow them; for this reaſon

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the objections to them ſhould be very fully weighed and conſidered."

There are two objections againſt allowing this *modus*, which are inſiſted upon as ſufficient to overturn it. Firſt, a general one, that the affirmative part of the *modus*, the payment of 9d per acre, cannot have ſubſiſted time out of mind, of which the court is bound to take notice; and that it cannot have ſubſiſted time out of mind from the alteration of the value of money; becauſe 9d per acre muſt be much above the value of the Tithe of his land, at the time this *modus* or compoſition muſt be ſuppoſed to commence; which the law of *England* by a pretty extraordinary law (and which I believe no other country does) makes from the tranſportation of *Richard* the firſt to the holy land. The other is an objection tending to the ſame thing; that this *modus* cannot have ſubſiſted time out of mind, becauſe there is an exception of a product and culture, which was not and could not be in uſe at the time when it muſt be ſuppoſed to commence; and that this exception, being part of the agreement, muſt be coeval with the agreement which ſhews, it could not be an agreement time out of mind.

And

And this objection hath ſomething in it very material; for hops are always allowed to have been introduced in modern times, that is, modern with reſpect to long antiquity. They began to be uſed and propagated in Queen *Elizabeth*'s reign, and exiſted in this kingdom in *Philip* and *Mary's* time and before, as appears from the *ſtatute* of *H.* 8. they were therefore here as tobacco planted in ſmall quantities for curioſity: but they were in this kingdom, to a certain degree before Queen *Elizabeth*'s time, though *non conſtat* how far.

Is it poſſible there ſhould be ſuch an exception in the beginning? or does the making this exception overturn the affirmative part of the *modus*? Suppoſe the agreement was to pay 9d per acre, for all ſmall Tithes of this land, except ſuch ſmall Tithes ſhould afterwards be introduced, that would certainly be a good agreement. Then inſtead of laying it in thoſe general words, they have ſpecified it with ſuch a ſort of products as theſe lands probably will be tilled with. But it is too much to lay ſuch weight on the objection to overturn this *modus*, when I ſee what has already paſſed.

The more material objection is upon the affirmative part of the *modus* itſelf, whether it is not too rank? It is inſiſted upon as too high

high in point of value, and therefore that the court is bound to take notice of it, and ought to over rule it. That doctrine has certainly prevailed in ſeveral caſes; and has been more commonly allowed as to the value of particular things, for which the *modus* has been ſet up, as where it is ſo much for a ſheep or lamb, or a particular kind of product, the value of which may be ſhewn at theſe times; but it may differ as to a *modus* ſet up as the value of the lands, becauſe ſeveral incidents and accidents may attend that, the alteration of traffic or commerce, or of the culture of land, either improved or fallen in value by accident, that makes ſuch a *modus* more uncertain than in reſpect of value of a particular kind of product, as calves, ſheep, lambs, and things of that kind. Therefore though this objection is taken in point of law for the ſaid judgment of the court, the court does not always proceed as bound to determine it that way, but hath conſidered it as a matter of fact for a jury. And this plaintiff has conſidered it as ſuch and has entered into proof of the fact, that is by records to ſhew the value of the land in the time of *Henry* the 8th:

2 Vez. 506. His Lordſhip directed an iſſue to be tried in *London*, whether the occupiers of the marſh land in this pariſh have paid, *&c.* juſt as

as it is ſtated in this anſwer, and the defendant in chancery to be the defendant at law.

And in the caſe of the rector of *Stoke* cited by the Lord Chancellor in the laſt mentioned caſe, which was firſt in the exchequer, *Gifford* brought his bill for Tithe in kind, and particularly for Tithe of lambs.

The defendant inſiſted, that neither he nor his predeceſſors were entitled to receive that, becauſe of an ancient cuſtom or uſage in that pariſh, that every occupier having land, paid threepence, and no more, as a *modus*, in full ſatisfaction of the Tithe of ſuch lamb. The court did not determine it on the hearing, but directed a trial; but the plaintiff did not proceed to trial; and the court ordered the iſſue to be taken *pro confeſſo*, and afterwards ordered his bill to be diſmiſſed.

From that he appealed; and the reaſon given for ſuch appeal, was, that the court ought not to have directed an iſſue, but ſhould have over ruled this *modus* as too rank, becauſe of the ancient price of cattle and other commodities; ſo that a lamb would not formerly be worth more than ſixpence; and that it was proved to be only a modern

compoſition. The anſwer given to that, is, that the ground for that objection ſeemed to be, that the *modus* was ſo great and ſo nearly the value of the Tithable matters, for which paid, that it muſt be a modern compoſition, conſidering the decreaſe in the value of coin; but that this objection ariſing on matter of fact was very proper to be conſidered by a jury.

It was heard before the lords in 1735, and they affirmed the decree.

And in the caſe of *Graſcomb* v. *Jeffries*, 1687, upon a *modus* for twelve-pence for Tithes of marſh lands in the county of *Kent*, the court directed an iſſue at law.

And according to Lord Chancellor *Hardwick's* opinion, the regular way with regard to ſuch *moduſes*, is, to direct an iſſue at law to try their validity, as was done in the laſt mentioned caſe.

By *Gibs* 675. A *modus* muſt be ſomething durable, becauſe the Tithe in kind is in itſelf an inheritance certain, and it is againſt nature that it ſhould be extinguiſhed by a recompence not as durable at leaſt, though not ſo valuable: for this reaſon four-pence to be paid yearly by two ſuch perſons inhabiting two ſuch houſes,

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in conſideration of all Tithes, hath been adjudged ill; becauſe the houſes may decay, and none live in them.

In this cuſtom and preſcription agree, that they muſt be conſtant without interruption, and perpetual from the time whereof the memory of man is not to the contrary; for if there have been frequent interruptions, Deg. 268. there can be no cuſtom or preſcription obtained; but after a cuſtom or preſcription is once duly obtained, a diſturbance for ten or twenty years ſhall not deſtroy it.

Notwithſtanding a cuſtom or preſcription (on a *modus*) to be diſcharged of Tithes, is created by continuancy of time, yet it may be afterwards loſt by diſuſer, *non* payment of the conſideration or otherwiſe, and in ſuch caſe, the parſon may have his Tithe in kind. For cuſtom and preſcription may be loſt as well as got by time.

But *Price* and *Maſcal*'s caſe, as reported in 1 *Bulſt.* 240. An interruption of the uſage for ſuch time only as doth not deſtroy the poſſibility of making proof that ſuch a cuſtom or preſcription has been, does not deſtroy ſuch cuſtom or preſcription.

And in the caſe of *Nowell* v *Hicks.* Vicar of *Edmonton*, in prohibition, a *modus decimandi*,

di, was alledged by preſcription time out of mind, for Tithe of lambs, and thereupon iſſue joined; and the jury found that before twenty years then laſt paſt, there was ſuch a preſcription, and that for theſe twenty years he had paid tithe lambs in kind.

It was objected; firſt, that the iſſue was found againſt the plaintiff, for that the preſcription was general, for all the time of preſcription, and twenty years fail thereof.

Second, that the party by payment of Tithes in ſpecie, had waived the preſcription or cuſtom.

Co. Lit. 114. But it was adjudged for the plaintiff in the prohibition; for albeit the *modus decimandi* had not been paid by the ſpace of twenty years, yet the preſcription being found, the ſubſtance of the iſſue is found for the plaintiff.

1 Roll. Rep. 176. For otherwiſe a leſſee might pay Tithes in kind, where there is only a *modus* due, and thereby bar his leſſor of the benefit of the *modus* in after time.

A *modus* may be loſt, by the alteration or deſtruction of the thing for which the *modus* was

was paid; as if there be a *modus* to pay a certain rate for the Tithe of a mill.

As in a caſe, *Brownl.* 32.—Two fulling-mills were under the ſame roof, for which a rate Tithe had been paid time whereof the memory of man was not to the contrary; thoſe mills were afterwards altered and made into corn-mills. The *modus* was adjudged to be loſt.

And if there be but one pair of ſtones in a mill, and a *modus* is to pay a certain rate for them, and then another pair of ſtones is put into the ſame mill, it is ſaid the *modus* is loſt. Gouldſ. 32.

And if a man preſcribe in *modo decimandi* for hay and graſs, in forty acres of land, and the tenant converts it into a hop-garden, or into tillage, the *modus* is thereby deſtroyed. For when the *modus* is ſpecial, as for hay and graſs, *&c.* only, it will be there deſtroyed by the converſion of the land to other uſes; and it was ſo held in *Sharp* and *Coult's* caſe, 1 *Roll. Abr.* 651.

And in *Spardam's* caſe it was held, that if a *modus* had been for a park time out of mind, and afterwards the park is diſparked, and the lands converted into tillage, *&c.* if 1 Roll. Abr. 651. Noy. 148.

the *modus* were general for the park, it is gone when the park is diſparked; but otherwiſe it is, if the *modus* is for ſo many acres of land contained in the park.

Hutt. 57. In *Pool* and *Reynold*'s caſe; if a preſcription be to pay a buck or a doe out of the ſame park, when it is diſparked the preſcription is gone.

And where a preſcription is to pay a ſhoulder of every buck at *Chriſtmas*, and, according to *Brownl.* and *Gouldſborough* 1. *p.* 31. the court doubted upon this park's being diſparked whether Tithes ſhould be paid in kind or not.

Moor. 909. S. C. Owen 74. But *Popham* ſaid, that where the preſcription is to pay a ſhoulder of every buck or doe at *Chriſtmas*, if the park be diſparked, Tithes in kind ſhall be paid. *Bedingfield* v. *Feak*'s caſe, 3 *Cro.* 467.

And when a preſcription was to pay two ſhillings yearly, and the ſhoulder of every third deer killed within the park, *Winch* and *Warburton* held that by the diſparking of the park, the preſcription as to the ſhoulders was determined, and by conſequence all the *modus decimandi*, and then that the parſon ſhall have Tithes in kind.

And

And that if the park ſhall be revived, the preſcription and *modus decimandi* ſhall alſo be revived.

But *Nichols* and *Hobart* held, that in ſuch caſe the preſcription ſhould endure; ſaying, that the two ſhillings is clearly a *modus decimandi*, which is certain, and the diſparking doth not hinder the payment of it; and the ſhoulders are but caſual, and upon the diſparking the parſon ſhall loſe them, and recover in the court *Chriſtian* a recompence for them in money. As, if a man will not ſet forth his Tithes, the Tithes themſelves ſhall not be recovered, but a recompence for them; and in this caſe, though he was to have the ſhoulders according to the number of the deer killed, which makes the value uncertain, yet the ſpiritual court ſhall ſet the value according to what was uſually paid when it was a park. In the caſe of *Cowper* v. *Andrews*, 1 *Roll. Rep.* 120. Hob. 39. Godb. 237.

But according to the former caſes the preſcription is gone, and Tithes are to be paid in kind; however it is clear, that if a *modus* be to pay a certain rate in money for all the Tithes of ſuch a park, ſuch *modus* ſhall hold notwithſtanding the park ſhall be diſparked.

Noy. 148. And in the caſe of *Sharp* v. *Sharp*:---if the *modus* be to pay a buck and a doe for all the Tithes of ſuch a park, the *modus* ſhall continue though the park be diſparked; for though they be *feræ naturæ*, and ſo not Tithable in themſelves, yet they may be given for Tithes by compoſition, and may be the conſideration of a *modus*.

A *modus* may likewiſe be loſt by *non*-payment of the conſideration or payment of Tithes in kind, for ſo long a time, as to deſtroy a poſſibility of making proof that ſuch cuſtom exiſted; but an interruption for ſome ſhort time only will not diſcharge it.

From the different caſes and authorities above referred to, the general rules following may be collected, which muſt be obſerved to make a good and ſufficient *modus*:

Firſt, It muſt be certain and invariable.

Second, The thing given in lieu of Tithes muſt be ſomething beneficial to the parſon or other proprietor of the Tithes.

Third,

Third, It muſt be ſomething different from the thing compounded for.

Fourth, One cannot be diſcharged from payment of one ſpecies of Tithes, by paying a *modus* for another.

Fifth, The recompence muſt be in its nature as durable as the Tithes diſcharged by it.

Sixth, The *modus* muſt not be too large, which is called a rank *modus*.

And a *modus*, though once eſtabliſhed, may be diſcharged two ways, *viz.*

Firſt, By the alteration or deſtruction of the thing for which the *modus* was paid.

Second, By *non*-payment of the conſideration, or payment of Tithes in kind, for ſo long a time as to deſtroy the poſſibility of making proof that ſuch cuſtom or preſcription exiſted.

Having fully conſidered a *modus decimandi*, we ſhall now proceed to treat of a preſcription or cuſtom *de non decimando*.

De non decimando is, to be free from the payment of Tithes, without allowing any recompence for the ſame to the parſon or other proprietor of the Tithes.

And the general rule is, that no layman can preſcribe in *non decimando*, that is to be diſcharged abſolutely from the payment of Tithes, and to pay nothing in lieu thereof, unleſs he begin his preſcription in a religious perſon, and derive a title to it by act of parliament.

Nov. 18, 1762. And in the caſe of *Breary* v. *Manby*, in the exchequer:---Mr. *Breary*, rector of *Middleton*, upon the *Woulds* of *Yorkſhire*, brought his bill againſt Mr. *Manby*, one of his pariſhioners, for great and ſmall Tithes ariſing from the defendant's lands.

The defendant by his anſwer inſiſted, that part of his farm had been time out of mind exempt from payment of Tithes of any kind, or any *modus* or compenſation in lieu thereof; and by his witneſſes proved, that no Tithe, *modus*, or compenſation had within the memory of man been paid for ſuch part of his farm.

The court, at the hearing of the cauſe, were clearly of opinion that the mere *non-*

payment

payment of Tithes for time immemorial would not be an exemption from payment of them, without ſetting out and eſtabliſhing ſuch exemption to have ariſen from the lands having been parcel of one of the greater abbies; and therefore decreed the defendant to account for the Tithes of that part of his eſtate for which he claimed the ſaid exemption.

All ſpiritual and religious perſons, as biſhops, deans, prebendaries, parſons, vicars, *&c.* may preſcribe in *non decimando*, for this is ſtill a ſpiritual perſon, and ſo nothing is taken from the church: for ſuch ſpiritual perſons were capable of a grant of Tithes at the common law in permanency. Deg. p. 2. c. 16.

And from this ariſes the privilege of a parſon in one pariſh, that hath part of his glebe lying in another pariſh, may preſcribe in *non decimando* for it.

But churchwardens who have land belonging to their churches, cannot preſcribe in *non decimando*, becauſe they are neither religious nor ſpiritual perſons.

A pariſh or particular town cannot preſcribe in *non decimando*. March Rep. 26.

A biſhop

A biſhop may preſcribe that he and his tenants for life, years, and will, and his copyholders have heen freed from the payment of Tithes; as in the caſe of *Wright* v. *Wright*: the Biſhop of *Worceſter* being ſeiſed in right of his biſhoprick of a manor preſcribed, that he and all his predeceſſors had held the ſaid manor and the demeſnes thereof time out of mind, for him, his farmers, tenants, for years or at will, diſcharged and acquitted from the payment of Tithes for thoſe lands. The biſhop made a leaſe for years of a parcel of the demeſnes; the farmer of the rectory libelled in the ſpiritual court againſt the leſſee for Tithes, who pleads all this matter in the court there, and the judge there refuſed to allow of the allegation in diſcharge of the Tithes.

1 Roll. Abr. 653.
1 Cro.

And on a prohibition it was reſolved, that where the lands of a biſhop are abſolutely diſcharged in his hands by preſcription, there the demiſing it to a layman could not make it chargeable with Tithes. That a ſpiritual perſon may preſcribe in *non decimando*. That the refuſal by the eccleſiaſtical judge to allow the allegation in diſcharge of Tithes is not traverſable.

And

And this general rule, that none but ſpiritual perſons can preſcribe in *non decimando*, is to be underſtood with ſeveral exceptions; as the king being *mixta perſona*, may preſcribe *de non decimando*; for the ſame reaſon, that as ſuch he is capable of Tithes.

Bridgman 33. Latch. 89. Goldſ. 395. 1 Jon. 181. 2 Bro. 8. 23. Cro. Jac. 57. Moor. 913. 2 Co. 49.

And in the caſe of *Whitton* v. *Weſton*, the queſtion was, whether the privilege of being diſcharged of Tithes belonged to the king only, or to him and his patentees? And upon argument, it was reſolved by three judges againſt one, that it was the right both of the king and his patentees to be diſcharged of Tithes.

In 2 *Leon.* 71. and *Owen* 56. *S. C.* it is ſaid to have been adjudged, that whilſt the king's title to ſuch lands remains, and they be manured by his farmers or tenants, for years or at will, no Tithes are to be paid of them, although Tithes ſhould have been paid of them by the farmers or tenants of the abbots or priors that held them before that ſtatute. And the reaſon given is, that the king himſelf cannot manure them, *&c.*

But it is ſaid, if the king having leaſed them, grants over the reverſion or ſells them, there the farmers ſhall pay Tithes.

But

But in another caſe *Janfield* chief baron ſaid, that the king's tenant for life or years, ſhall not be free from Tithes, but only his tenants at will; and it was there agreed, *per curiam*, that the king's patentee is to be intended of the king's farmers, and not his
Moor. 215. patentees in fee.

And in the caſe of *Compoſt*.——It is ſaid, that if the king alien any of the lands whereof he is diſcharged of Tithes, his patentee ſhall pay Tithes, and not only ſo, but the preſcription to be diſcharged of Tithes is deſtroyed for ever, though the ſame lands ſhould afterwards come again to the king's hands by eſcheat or other-
Hard. 315. wiſe.

And in *Foſſet* and *Franklin*'s caſe, it was agreed that the king's farmer ſhall be diſcharged of Tithes, though the diſcharge be only in *propriis manibus*.

Sir William *Jones* ſaid it had been ſo adjudged, but the court at that time did not remember it, and held the king's fee farmer was not diſcharged; no more is his leſſee coming in under the privilege of the monaſtery.

But

But they agreed that the king as a ſpiritual perſon, may preſcribe in diſcharge of himſelf and his farmers; but by a general preſcription the king's farmers are not diſcharged, much leſs on a diſcharge by privilege of order, *&c.* And the court conceived the preſcription muſt be alledged, and found for the king, his farmers, and tenants, and that *non*-payment by the under tenants of the king's farmers, is ſufficient evidence to prove ſuch preſcription. 3 Keb. 208. 217.

It ſeems fully ſetted, that the reverſioner, and the king's patentee, and their aſſigns ſhall have the ſame privilege that the abbot had, *viz.* to hold them free whilſt in his own hands, and not let to or manured by another. Benl. Rep. 143.

And in the caſe of *Sydown* and *Holmes*, caſe in 3 *Cro.* It was ſurmiſed for a prohibition, that the prior of *B.* was ſeiſed of lands parcel of his priory, and held them till the diſſolution diſcharged of Tithes for his farmers and tenants for life or years, and that the priory was diſſolved, 27 *H.* 8. That the king was ſeiſed of the lands, and ſhews the ſtatute, 31 *H.* 8. and 1 *Edw.* 6. and that the king died ſeiſed thereof, and that by mean deſcents it came to *J. S.* and that the plaintiff being his tenant for years, was

was ſued by the parſon of *B.* for the Tithes of thoſe lands. It was reſolved by the court,

That the lands which came to the crown by the ſtatute 27 *H.* 8. ſhould not be diſcharged from the payment of Tithes, but ſhould pay the ſame, although the ſame lands in the hands of religious perſons or houſes, were diſcharged from the payment thereof. For that theſe privileges, were perſonal privileges, which were extinguiſhed by the ſaid ſtatute of diſſolutions; and that there are not any words in the ſaid ſtatute, 27 *H.* 8. to ſave the ſaid privileges; and the ſtatute of 31 *H.* 8. being a ſubſequent law, had no reſpect to thoſe privileges.

And the like was determined in the caſe of *Parkins* and *Hind*, 1 *Cro.* and *Hob* 5.

In the caſe of *Bolls*, v. *Atkinſon*. It was an action of debt, on the ſtatute of *Edw.* 6. for Tithes and on *nil debet*, a ſpecial verdict
1 Lev. 185. found,

That the abbot of *Abingdon* was ſeiſed in fee of lands, being a parcel of meadow in *Oxford*, in right of his houſe; and that he and all the abbots, *&c.* his predeceſſors, time out of mind, held it diſcharged of Tithes,

Tithes, and granted it to the college of *All Souls*, in *Oxford*.

And the queſtion was, if the college ſhould hold it diſcharged of Tithes as the abbot did?

And for the plaintiff it was argued that this preſcription was perſonal, and that by the alienation it was determined, and that ſo it would be, if he had aliened to another eccleſiaſtical perſon, though capable of the permanency of Tithes, as 35 *H* 6, 56, 57. the caſe of the hoſpitalers; and much more when aliened to a lay perſon not capable of Tithes. And here they ſhall not be intended to be diſcharged by any real compoſition, not being pleaded to be ſo.

But on the contrary it was argued, that the land and the Tithes might be granted to the abbot before the council of *Lateran*; for before that council, a man might grant his Tithes to what eccleſiaſtical perſon he would. And this abbey was founded by king *John*, before the conqueſt; and he might have the lands and Tithes by purchaſe, and hold them by way of real compoſition, which differs from perſonal diſcharges, by way of bull, order, &c. which are perſonal. And a college is capable of

an appropriation, and ſo is ſpiritual as to the taking of Tithes. This caſe was twice argued, *viz.* in *Trin.* and *Hil.* 18, and 12. *Car.* 2.

And after the ſecond argument, the opinion of the court was delivered by the chief juſtice *Keeling*, as a caſe wherein they all agreed, that it cannot be intended a diſcharge, by a real compoſition, it not being pleaded, nor found by the jury to be ſo; but was a mere preſcription, and perſonal to the abbot, and did not run with the land, and judgment was given for the plaintiff.

And in the caſe of *Stephenſon, Gent*, v. *Hill*, *H.* 2. *G.* 3. 2 *Edw.* 6. *c.* 13. for the payment of Tithes of corn grain.

The defendant pleaded the general iſſue *nil debet*, and the cauſe came on to be tried at *Appleby* aſſizes, *Auguſt* 14, 1760, before Mr Juſtice *Bathurſt*. Upon the trial it appeared, that the lands whereon the corn mentioned in the declaration grew, were and immemorially had been cuſtomary lands parcel of the manor of *Morland* in the county of *Weſtmoreland*, and holden of the lord thereof from the time being.

It alſo appeared that the ſaid manor of *Morland*, and the appropriate rectory of *St. Michael, Appleby*, were parcel of the poſſeſſions of the priory of *Wetherall*, in the county of *Cumberland*, which was one of the larger diſſolved monaſteries, and was veſted in the crown by virtue of the ſtatute 31 *H.* 8. *c.* 13. And that the prior of the ſaid priory, at the time of the diſſolution was, and had been time immemorially ſeiſed of the ſaid manor with the appurtenances, in his demeſne as of fee, in right of his priory; and alſo of the appropriate rectory of *St. Michael, Appleby*, and the Tithes there. It alſo appeared that the ſaid manor and appropriate rectory being ſo veſted in the crown, the ſame was due in manner granted by the dean, chapter of the holy and undivided *Trinity* of *Carliſle* in fee; and that they are ſtill ſeiſed thereof in fee, in right of their church; and that the preſent defendant was the cuſtomary tenant and occupier of the ſaid lands whereon the corn grew, during the time in the declaration, mentioned and held the ſame of the ſaid dean and chapter as of their ſaid manor of *Morland*.

That the plaintiff is farmer of the corn and grain Tithes growing and ariſing within the territories of *Bondgate*, within the pariſh of *St. Michael Appleby*, aforeſaid; and the

lands whereon the corn grew, lie in the territories and pariſh aforeſaid.

It appeared that no Tithes had ever been yielded or paid for, or in reſpect of the ſaid lands. It alſo appeared, that all the other cuſtomary tenants of the ſaid manor paid Tithes. It appeared alſo, that this was the only cuſtomary tenant belonging to the ſaid manor, which was within the ſaid pariſh of *St. Michael.*

Whereupon a verdict was found for the plaintiff, ſubject to the opinion of the court of king's bench, upon the following queſtion; "whether the defendant could in this caſe ſet up any preſcription which would, by virtue of the ſtatute of 31 *H.* 8. exempt him from the payment of Tithe."

Mr. *Aſpinal* who argued for the plaintiff made two queſtions of it, viz. firſt, whether the tenant can ſet up any preſcription at all, to exempt him from the payment of Tithes? ſecondly, whether the facts ſtated were a ſufficient foundation for an exemption? even ſuppoſing that he might ſet one up, the ſecond point he ſaid might be taken firſt.

The fact ſtated, that no Tithes had ever been paid, is no exemption of itſelf; it is

no

no preſcription of exemption, it is only evidence. It might have ariſen from unity of poſſeſſion, or other cauſes. It will be no foundation for a decree in equity, if it had been actually found by a verdict, that they never have been paid. A lord of a manor can only preſcribe as the lands have been holden by his farmers and tenants at will; theſe are ſtated to be cuſtomary lands, parcel of the manor of *Morland*, holden of the lord of the manor; not ſaying, at the will of the lord; therefore they are cuſtomary freeholds.

Now a lord cannot preſcribe for his cuſtomary freeholders, though he may preſcribe for his tenants and farmers of copyhold holden at will; the court will favour the better eſtate. Therefore taking it to be a cuſtomary freehold, the lord could not preſcribe in any manner whatſoever; he cannot preſcribe as by the cuſtom of the manor which is ſtated to be quite contrary.

It was anſwered for the defendant, that no Tithes having been ever paid for theſe lands, from 31 *H.* 8. a legal exemption will be preſumed. This was a great abbey that came to the crown by the *Stat.* 31. *H.* 8. and the manor was in the prior in right of his priory. Theſe lands were therefore diſ-

charged from payment of Tithes, at that time, and their diſcharges from Tithes are preſerved to the crown, and their grantees and aſſignees, by 31 *H.* 8. in the ſame manner and to the ſame extent as when they were in their hands.

Spiritual perſons may preſcribe in *non decimando*; and ſo may their farmers and tenants, and even their copyholders of inheritance. And cuſtomary eſtates of inheritance may be diſcharged in the ſame way, for the freeholders in the lord; though many other parts of this eſtate have paid Tithe, yet there may be a preſcription for a diſcharge for part; a preſcription may be for a ſingle part alone. But this is the only tenement that lies in this particular pariſh. Theſe cuſtomary tenures are not freeholds; the timber, the mines, are in the lord.

This cauſe now ſtanding in the paper for further argument, Mr. Solicitor General (Sir *Fletcher Norton*) who was for the plaintiff, ſaid that the particular cuſtoms of the manor (which had been inquired after, in the courſe of the former argument) were not yet ſent up.

By Lord *Mansfield*, what ſignify the cuſtoms? Clearly the freehold is in the lord. Sir *Fletcher Norton* acknowledged that he had

had a great difficulty to get over, it being ſtated in the caſe itſelf; that this was the only cuſtomary tenant belonging to the manor, which was in this pariſh.

By the court, it is a ſettled point that the freehold is in the lord; and Lord *Mansfield* added, that this is rather ſtronger than the caſe of copyholds; for, copyholders had acquired a permanent eſtate in their lands, before theſe perſons had done ſo. And they ordered the *poſtea* to be delivered to the defendant, in order for a judgment of nonſuit. 3 Burr. 1278.

Note, in the above caſe, the following deciſions, *&c.* were cited. For the plaintiff, 1 *Salk.* 365. *Moore* 528. For the defendant 1 *Roll. Abr.* 653. 2 *Co.* 44. *Cro. Eliz.* 216. 475. 511. 704. 784. *Moore* 219. *Yelv.* 2 *Noy.* 133. 11 *Co.* 14. 2 *Keb.* 459. *Hob.* 306.

A privilege is ſaid to be an exemption derived from the ſupreme authority upon good conſideration, and refers ſometimes to perſons, and ſometimes to places. And although by the *Stat. Edw.* 6. none are to pay Tithes for lands privileged, or lawfully diſcharged from the payment thereof; yet it is ſaid ſuch privileges are merely perſonal, and do not exempt ſuch lands from the pay- Rep. Can. 436.

ment of Tithes longer than they are in the hands of privileged perſons.

2 Co. 47, 48. 4 Leon. 47. Yet ſuch privilege of being diſcharged of Tithes, or other preſcription *de non decimando*, when annexed to a ſpiritual corporation, will periſh by a diſſolution of ſuch corporation, and the coming of the lands to lay hands, without the aid of direct words in an act of parliament for continuing of ſuch privilege in lay hands, as before is ſhewn. Yet upon a favourable conſtruction of the *Stat.* 31. *H.* 8. preſcription is of that force, that where any of the lands belonging to monaſteries, *&c.* which were diſſolved by that ſtatute, were in ſuch pariſhes, whoſe churches were appropriated to any of the ſaid monaſteries, ſo that the monaſtery was ſeized of the ſaid lands and rectory *ſimul et ſemel*, time out of mind, and paid no Tithes within the memory of man, for the lands, ſuch lands ſhall be diſcharged of Tithes by reaſon of ſuch perpetual unity of poſſeſſion.

Yet, according to *Jon.* 412, if in this caſe of unity of poſſeſſion, the farmers of the demeſnes had paid Tithes, *&c.* to the abbot, *&c.* when ſuch lands were uſed or occupied by their tenants or farmers, either at will, or for years, or for life, there the intendment of the law (which ought to be uninterrupted

uninterrupted time out of mind) will not hold place.

If an abbot had made a leaſe for years of ſuch lands but a year before the diſſolution, although that the leaſe was made void by the ſtatute, yet this leaſe ſhall deſtroy the unity of poſſeſſion, ſo that it may not be pleaded in diſcharge of the Tithes; but it is admitted, that it would have been otherwiſe if there had been an abſolute nullity of the leaſe *ab initio*, without a conſequent ſtatute to make it void. And it was ſo adjudged by the court. 2 *Bulſt.* 67.

In a like caſe, *Popham* ſaid, that an unity in eſtate, and not in occupation of the land and rectory, at the day of the diſſolution by the abbots, *&c.* is not any diſcharge of the Tithes within the ſtatute; no, not though the land was in leaſe but for one year at the time of the diſſolution; and although there had been an unity of poſſeſſion time out of mind, and until the laſt year, or other ſhort time before the diſſolution. Moor. 528. 3 Cro. 584.

And in the caſe of *Dobitoft* v. *Curteen*, the caſe was, that an abbot and his predeceſſor had been ſeiſed of a rectory, and of lands within the ſame pariſh time out of mind, *&c.* until the 26th year of *H.* 8. at which time

time the abbot made a leaſe of the lands for ſixty years, and there by demiſed all Tithes, renewing, ariſing, *&c.* upon the ſaid lands, *viz.* hay, corn, *&c. reddendo perinde*, certain corn rent; and by the ſame indenture it was covenanted, that the leſſee ſhall not ſet forth the Tithes of the hay and corn to the leſſor and his ſucceſſors, but that the leſſee, his executors and aſſigns ſhall ſet forth the Tithe of wool and lamb to the leſſor, *&c.* and ſmall Tithes to the vicar; and afterwards, in 31 *H.* 8. the ſaid abbey was diſſolved; and in the ſame year the ſtatute was made which enacts, "That the purchaſer (of the king) ſhall hold it diſcharged in the ſame manner as it was in the hands of the abbots, *&c.*"

And it was adjudged, that this unity of poſſeſſion joined with the other circumſtances, ſhall not diſcharge the lands from the payment of Tithes. For, firſt, there is a demiſe of the lands, and the Tithes alſo, which argues that they were due and payable in themſelves; ſecondly, here is a proviſion for the payment of other Tithes; thirdly, there is a covenant that the Tithes leaſed ſhall not be ſet forth; and, fourthly, it is found that lambs and wool were paid in kind, and a payment of part of the Tithes is a ſeiſin of all. From whence it follows,

follows, that the lands had never been discharged by any real compoſition; and ſo, conſequently, that though the Tithes of corn and hay were not paid during the unity, yet for that they were paid ſometime before the diſſolution, therefore of right they were payable. 2 Cro. 452.

If Tithes were not paid time out of mind by any houſe of religion, and they leaſed the land for years, and received Tithes of the leſſee, and the leaſe expired two years before the diſſolution of the ſame houſe, it is ſaid the king himſelf ſhall not be diſcharged of the payment of Tithes by the *Statute* 31. *H.* 8. 2 Co. 48. 2 Brownl. 26.

If the farmers have paid Tithes before the ſtatute, the ſame may be pleaded, and iſſue may be taken thereupon; but if the lands were always occupied by the abbot, or demiſed over, and no Tithes paid thereof before the ſaid ſtatute, there the land is diſcharged from the payment of Tithes. 11 Co. 14. Hob. 298.

Land that was diſcharged from the payment of Tithes by unity of poſſeſſion, came to the king by 31 *H.* 8. then by force of the branch of diſcharge therein, (which ſee hereafter) a general allegation, that ſuch prior held the land at the time of the diſſolution Moor 420.

ſolution of the priory, diſcharged of the payment of Tithes, without ſhewing how is ſufficient.

In the caſe of *Priddle* v. *Napper*, 11 *Co.* 14. it was aſked, whether an appropriation made in the times of *Ed.* 4. *H.* 6. *H.* 5. *H.* 4. *R.* 2. *Ed.* 3, *&c.* and yet in law within time of memory, and an unity had continued from the time of the appropriation until the diſſolution, and Tithes were never paid by the abbots, *&c.* or their farmers, ſhould not the ſtatute extend to theſe caſes? And it was anſwered, No, upon the point of unity; for if he will have aid of the act of 31 *H.* 8. the unity, as hath been ſaid, muſt be perpetual.

And yet in ſuch caſe, there may be alledged the branch of the ſaid act of 31 *H.* 8. concerning the diſcharge of payment of Tithes, *&c. viz.* "That the abbots, *&c.* time out of mind, *&c.* until the diſſolution, have held the lands diſcharged of Tithes, and ſo preſcribe in *non decimando* as at the common law, and give ſuch evidence that may prove it; and by this means, if in truth the lands are diſcharged, he hath ſufficient remedy to relieve himſelf; but if the priory or abbey were founded within time of memory, *i. e.* ſince 1 *Richard* 1.

there

there he cannot preſcribe at all. And the like was held in the caſe of *Engliſh* v. *Jones*. 2 Keb. 459.

Unity of poſſeſſion, time out of mind, *&c.* was ſuggeſted, in order to obtain a prohibition to ſtay a ſuit in the ſpiritual court for Tithes. The defendant pleaded that the abbey to which, *&c.* was founded 5 *Ed.* 1. (which was near ninety years after the 1 *R.* 1.) and confeſſed the unity from the time of the foundation; and *per curiam*, this is a good plea in bar to avoid the unity, and that it was not needful to traverſe the preſcription; for the ſhewing the foundation of the abbey to be after time of memory, is a ſufficient confeſſing and avoiding the unity. But if the defendant encounter the ſuggeſtion of perpetual unity, and will ſhew that the demeſnes before the ſtatute, and in the time of the abbey, were in the hands of farmers, *&c.* there he ought to traverſe the preſcription; for although the poſſeſſion was chargeable in other hands, yet, as to the fee-ſimple, which is in the abbot, it is a diſcharge in right. In *Yelv.* 31. the defendant traverſed the unity at the time of the diſſolution; and thereupon the plaintiff demurring, the court held the traverſe to be good; but if the diſcharge had been pleaded generally by preſcription, and not 3 Cro. 584.

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by reaſon of unity, then the preſcription ought to have been anſwered, and not the unity.

Neither will a preſcription *de non ſolvendo*, in the caſe of unity, avail any thing, if the union was juſt; for if the abbots, *&c.* have held by abuſe and wrong, time out of mind, *&c.* the ſame is no unity within the ſtatute, ſo if the abbot did hold the lands and Tithes in ſeveral rights.

11 Co. 14 b. Moor 46.

In *Knightly* v. *Spencer*'s caſe, 1 *Leon.* 335: an abbot had a manor within the pariſh of *D.* and a compoſition was made betwixt the parſon of *D.* and the ſaid abbot, that the parſon ſhould have yearly certain loads of wood out of thirty acres of the ſaid manor, for, and in recompence of all the Tithes of wood there, and afterwards the parſonage was appropriated to the ſaid abbot; and then the houſe was diſſolved, and the manor granted to one, and the rectory to another, it was held that the portion of Tithes was reviſed, for he had them (*i. e.* the manor and the Tithes) in ſeveral rights. And *Manwood*, chief baron, and *Perians*, juſtice, to whom this caſe was referred from the court of chancery, concerning the diſcharge of Tithes, by unity of poſſeſſion, delivered their opinions, "that ſuch an unity

unity is not any diſcharge within the ſaid ſtatute."

An abbot had a parſonage appropriate in *D.* which was diſcharged of Tithes, and afterwards the abbot purchaſed part of the lands, ſo that the Tithes were ſuſpended during the poſſeſſion of the abbot; but after that, the abbey was ſurrendered into the hands of the king in the thirtieth year of *H.* 8. and afterwards the ſame poſſeſſions were given to the king by the 31 *H.* 8. as they were in the hands of the abbot.

And it was adjudged that the lands ſo purchaſed by the abbot before the ſurrender were not diſcharged of Tithes by the ſtatute, for that no lands are diſcharged by the ſtatute but ſuch lands as were lawfully diſcharged by compoſition, or other lawful means, and the lands in this caſe were not diſcharged in right, but ſuſpended during the poſſeſſion of the abbot in his own hands, and as it was when the land is purchaſed by one, and the parſonage by another, the right of Tithes is renewed, and the lands charged as before the purchaſe of the abbot. *Mich.* 17 *Eliz. B. R. Godb. p.* 1.

And when upon a prohibition the ſurmiſe was, that the land out of which the

Tithes

Tithes were demanded was copyhold, parcel of a manor of which a prior was ſeiſed in fee, and was alſo parſon *imparſonee*, and that by this union the Tithes were extinct, it was held that the ſurmiſe was not good, for that the union was no diſcharge of the Tithes of the copyholders.

Moor 219. 528.

Unity of poſſeſſion originally was, where an abbot, prior, *&c.* time out of mind, had been ſeiſed of lands in themſelves, and alſo of the rectory of the pariſh where ſuch lands did lie, ſo that the unity of the parſonage to which the Tithes were payable, and of the lands which ſhould pay Tithes, either by appropriation or otherwiſe, and ſo that both the parſonage and lands were in the hands of the ſame religious perſons, and therefore the lands were diſcharged from the payment of Tithes on account of this unity of poſſeſſion.

But it is to be obſerved, that according to *Hob.* 44, 297, though by ſuch union the perſons ſo poſſeſſed were diſcharged from the payment of Tithes, yet the lands were not abſolutely diſcharged of the Tithes; for upon any diſunion that might happen, the payment of Tithes again revived; ſo that the union only ſuſpended the payment, but was no abſolute diſcharge

2 Inſt. 955. Moor 46. Cro. Jac. 608.

of

of the Tithes themſelves, and therefore ſuch union cannot be pleaded as a diſcharge from Tithes, but only as a diſcharge from the payment of them.

Since the *ſtatute* 31 *H.* 8. ſuch an unity of poſſeſſion of lands in the ſaid religious houſes and perſons ſhall be an abſolute diſcharge of Tithes, to the king's patentee, *&c.* for ſuch lands as came to the crown by that *ſtatute.*

It now appears, that the union upon the ſaid *ſtatute*, muſt appear to have had theſe four qualities, viz. *juſta*, *libera*, *equalis*, and *perpetua.*

It muſt have been *juſta*; *i. e.* claimed by right, and good and lawful Tithe.

Secondly, it muſt have been *equalis*; *i. e.* there muſt have been a fee ſimple both in the lands and in the Tithes.

Thirdly, it muſt have been *libera*; *i. e.* free from the payments of Tithes in any manner.

Fourthly, it muſt have been *perpetua*; *i. e.* time out of mind.

1 Roll. Abr. 654. Hob 266. 2 Bulſt. 245.

A county, or part of a county, may plead a cuſtom *de non decimando*, in reſpect of this or that particular Tithe; as hath been pleaded and allowed in the caſe of Tithe milk of ewes. And of Tithe of underwood in the wilds of *Kent* and in forty pariſhes in the wilds of *Suſſex*.

Raym. 137. S. C.

In the caſe of *Hick's* v. *Woods*, *on Salk.* 655. In attachment on prohibition, the plaintiff declared off a cuſtom in ſuch a hundred, to pay no Tithe for agiſtment of cattle barren; iſſue was taken upon the cuſtom and found for the plaintiff, but judgment was arreſted, for,

Tithe of agiſtment is due of common right, and the court took this difference: viz.

March 26. 1 Roll. Abr: 653.

That a hundred or a county, cannot preſcribe in a *non decimando*, for a thing that is in its nature Tithable.

But of things which in their nature are not Tithable *de jure*, a hundred or county may preſcribe in a *non decimando*, becauſe they are diſcharged in ſuch caſe without a cuſtom

to

to the contrary and they do but insist on their ancient right, and that custom hath not prevailed against it; therefore the case of wood and the hearth penny, which is but a *modus* for it, they allowed to be good law; because wood is not in its nature Tithable. 1 Lit. Rep. 152.

CHAP. VII.

LANDS DISCHARGED OF TITHES, BY ACTS OF PARLIAMENT.

The ſeveral Statutes for diſſolving Abbies, Monaſteries, the Hoſpitals of St. John of Jeruſalem, College and Chantery Lands, alſo 2 and 3 *Edward* 6. *as to Barren Lands, &c. and a table of the Monaſteries of the Yearly value of Two Hundred Pounds or upwards.*

THE ſeveral ſpecies of land, which by the common law, or by reaſon of ſome incident or quality annexed to, or inherent in them, are diſcharged of Tithes, having been mentioned in the preceding chapter; therefore to proceed in regular order, we muſt now conſider thoſe lands which are diſcharged of Tithes by acts of parliament, and how, and in what manner, they are ſo diſcharged.

The

The lands ſo diſcharged, are principally ſuch as belonged to the ſeveral diſſolved abbies, priories, monaſteries, nunneries, chanteries, colleges, or free chapels, and other religious houſes, orders, and ſocieties, barren lands, derelict lands, fenny lands, thorney lands, *&c.*

But note, all ſuch lands are not diſcharged from Tithes, and ſome lands, (as barren lands, *&c.*) have only a temporary diſcharge. as will more fully appear in the courſe of this chapter.

The ſtatutes by which abbies, monaſteries, *&c.* were diſſolved, (or rather by which the ſurrender of their charters, *&c.* were confirmed) are the 27 *Hen.* 8. *C.* 28. 31 *Hen.* 8 *c.* 13. 32 *Hen.* 8. *c.* 24. 37 *Hen.* 8. *c.* 74. *and* 1 *Ed.* 6. *c.* 14.

By the 27 *Hen.* 8. it is enacted. " That " his majeſty ſhall have and enjoy, to him " and his heirs for ever, all and ſingular ſuch " monaſteries, priories, and other religious " houſes of monks, canons, and nuns, of " what kinds of diverſities of habits, rules, " or orders, ſoever they be called or named, " which have not in lands, tenements, rents, " Tithes, portions, and other hereditaments " above the clear yearly value of two hun-

" dred pounds. And in like manner ſhall
" have and enjoy all the ſcites and circuits
" of every ſuch religious houſes, and all
" and ſingular the manors, granges, meſſes,
" lands, tenements, rents, reverſions, ſer-
" vices, Tithes, penſions, churches, chapels,
" advowſons, patronages, annuities, rights,
" conditions, and other hereditaments, ap-
" pertaining, or belonging to every ſuch
" monaſtery, priory, or religious houſe, not
" having, as is aforeſaid above the ſaid
" clear yearly value of two hundred pounds,
" in as large and ample a manner as the
" abbots, priors, abbeſſes, and other gover-
" nors of ſuch monaſteries, priories, and
" other religious houſes, now have, or ought
" to have the ſame, in the right of their
" houſes. And that alſo his highneſs, ſhall
" have to him and his heirs, all and ſingu-
" lar ſuch monaſteries, abbies, and priories,
" which at any time within one year, next
" before the making of this act, hath been
" given, granted to his majeſty, by any
" abbot, prior, abbeſs, or prioreſs, under
" their covent ſeal, or that otherwiſe hath
" been ſuppreſſed or diſſolved, and all and
" ſingular, the manors, lands, tenements,
" rents, reverſions, Tithes, penſions, por-
" tions, churches, chapels, advowſons, pa-
" tronages, rights, entries, conditions, and
" all other intereſts, hereditaments, to the
" ſame

" ſame monaſteries, abbies, and priories,
" or to any of them appertaining or be-
" longing. To have and to hold, all and
" ſingular the premiſes, with all their rights,
" profits, juriſdictions, and commodities,
" unto the king's majeſty, and his heirs and
" aſſigns for ever, to do and uſe therewith
" his and their own wills to the pleaſure of
" Almighty God, and to the honour and
" profit of this realm.

" That all, and every perſon and perſons, S. 2.
" and bodies politick, which now have, or
" hereafter ſhall have any letters, patents,
" of the king's highneſs, of any of the
" ſcites, circuits, manors, lands, tenements,
" reverſions, ſervices, Tithes, penſions,
" portions, churches, chapels, advowſons,
" patronages, Tithes, entries, conditions,
" intereſts, or other hereditaments, which
" appertained to any monaſteries, abbies,
" or priories, heretofore given or granted
" to the king's highneſs, or otherwiſe ſup-
" preſſed or diſſolved, or which apper-
" taineth to any of the monaſteries, abbies,
" priories, or other religious houſes, that
" ſhall be ſuppreſſed or diſſolved by the
" authority of this act, ſhall have and enjoy
" the ſaid ſcites, circuits, manors, lands,
" tenements, rents, reverſions, ſervices,
" Tithes, penſions, portions, churches, cha-

" pels, advowſons, patronages, Tithes, en-
" tries, conditions, intereſts, and all other
" hereditaments, contained and expreſſed
" in their letters patents, now being thereof
" made, and to be contained and ſpecified
" in any letters patents hereafter to be made,
" according to the tenor, purport and effect,
" of any ſuch letters patents; and ſhall
" alſo have all ſuch actions, ſuits, entries,
" and remedies to all intents and purpoſes,
" for any thing or things contained in every
" ſuch letters patents, now made or to be
" contained in ſuch letters hereafter to be
" made, in like manner, form, and condi-
" tions, as the abbots, priors, abbeſſes,
" prioreſſes, and other chief governors of
" any religious houſes which had the ſame,
" might or ought to have had, if they had
" not been ſuppreſſed or diſſolved.

S. 3. " Saving to every perſon, and perſons,
" and bodies politick, their heirs, and ſuc-
" ceſſors, (other than the abbots, priors,
" abbeſſes, prioreſſes, or other chief gover-
" nors of the ſame religious houſes, ſpeci-
" fied in this act, and the covents of the
" ſame, and their ſucceſſors, and ſuch as
" pretend to be founders, patrons, or do-
" nors, of ſuch religious houſes, of any
" lands, tenements, or hereditaments, be-
" longing to the ſame, and their heirs and
" ſucceſſors)

" ſucceſſors) all ſuch right, title, intereſt,
" poſſeſſions, leaſes for years, rents, ſervices,
" annuities, commodities, fees, liberties,
" livings, penſions, portions, corrodies,
" ſynodies, priories, and all other profits,
" as they or any of them hath, ought or
" might have had, in or to any of the ſaid
" monaſteries, abbies, priories, or other
" religious houſes, or in or to any manors,
" lands, tenements, rents, reverſions, Tithes,
" penſions, portions, or other heredita-
" ments, appertaining or belonging, or that
" appertained or belonged to any of the
" ſaid monaſteries, priories, or other reli-
" gious houſes, as if the ſame monaſteries,
" priories, and other religious houſes, had
" not been ſuppreſſed by this act, but had
" continued in their eſſential bodies and
" ſtates, that now be, or were in."

It is further enacted, " that all fraudulent S. 4.
" aſſurances made by the governors of ſuch
" religious houſes, *&c.* are void.

" That all the jewels, *&c.* belonging to S. 5.
" ſuch religious houſes, *&c.* ſhall be given
" to the king.

" That the king's royal highneſs ſhall S. 6.
" have and enjoy according to this act, the
" actual and real poſſeſſion of all and ſin-
" gular

" gular ſuch monaſteries, priories, and
" other religious houſes, as ſhall appear by
" the certificate remaining in the king's
" exchequer, not to have in lands, tene-
" ments, rents, Tithes, portions, and other
" hereditaments, above the ſaid clear yearly
" value of two hundred pounds; ſo that
" his highneſs may lawfully give, grant,
" and diſpoſe of them, or any of them at
" his will and pleaſure, without further in-
" quiſitions or offices to be had or found
" for the ſame.

S. 8. " Saving unto every perſon and perſons,
" being founders, patrons, or donors, of
" any abbies, priories, or other religious
" houſes, that ſhall be ſuppreſſed by this
" act, their heirs and ſucceſſors all ſuch
" right, title, intereſt, poſſeſſion, rents, an-
" nuities, fees, offices, leaſes, commons,
" and all other profits whatſoever they be,
" which any of them have or ſhould have
" had, without fraud or covin by any man-
" ner of means, or otherwiſe than by rea-
" ſon or occaſion of the diſſolution, of the
" ſaid abbies, priories, or other religious
" houſes, into or upon any of ſaid abbies,
" priories, or other religious houſes, whereof
" they be founders, patrons, or donors, or
" into or upon any lands, tenements, or
" other hereditaments, appertaining or be-
" longing

" longing to the ſame in like manner, form
" and condition as other perſons or bodies
" politick be ſaved by this act, as is afore
" rehearſed, and as if the ſaid abbies,
" priories, or other religious houſes, had
" not been ſuppreſſed, *&c.*"

By the expreſs words of this ſtatute, all the manors, lands, tenements, *&c.* belonging to monaſteries, abbies, *&c.* under the clear yearly value of two hundred pounds are given to the crown.

And theſe are not thereby made free from the payment of Tithes; although they were by the ſame ſtatute given in as large and ample a manner, as the abbots, *&c.* had the ſame in the right of their houſes; alſo all ſuch lands, *&c.* were by this ſtatute given, or confirmed to the crown, which did belong to any monaſtery, abbey or priory, as at any time within one year, next before the making of the ſaid act; as this ſtatute nor any other, not containing any clauſe, or words of diſcharge, *&c.* the lands thereby given have been, ſince the ſaid ſtatute, ſubject to the payment of Tithes, although they might be free from that duty, whilſt in the hands of the religious poſſeſſors, or their right to them did continue. Wats, c. 48.

And

Jon. 368. Hob. 306. 2 Cro. 607. S. C.

And in the caſe of *Sydown* v. *Holme*, 1 *Cro.* 422: in prohibition the ſurmiſe was, that a prior of a priory diſſolved by the ſaid ſtatute 27 *H.* 8. held the lands, for which the Tithes were demanded, diſcharged therefrom time out of mind, for himſelf, his tenants and farmers, for life or years.

The queſtion was, whether the prior's preſcription in *non decimando* was determined by the diſſolution of the priory, or ſtill remained to the king?

By *Brampton*, chief juſtice, the ſtatute of 27 *H.* 8. doth not preſerve this privilege, becauſe that there be not any words that the lands given thereby ſhall be diſcharged, as the abbots, *&c.* held them, and general words will not preſerve privileges which were determined, unleſs ſpecially revived. That *ſtatute* 31 *H.* 8. doth not extend to free land given by the former ſtatutes, for all the ſcope of the ſaid ſtatute is only to extend to abbies which came to the king after the 4th of *February*, 27 *H.* 8.; and all abbies which came unto him upon or before the 4th of *February*, 27 *H.* 8. doth not intend to extend. For in every branch are mentioned only the abbies, *&c.* which came to the king after 27 *H.* 8.

And

And although this clauſe, " to be diſcharged from the payment of Tithes," in the body of the ſaid clauſe is, " any monaſteries, *&c.*"; yet it is after the ſaid late abbots, *&c.* and abbots be not mentioned before in that clauſe, therefore it ought to be expounded and coupled with the clauſes before, which mention and intend only what came to the king after the 4th of *February*, 27 *H.* 8. and doth not extend to abbies which came to the king on the 4th of *February*, 27 *H.* 8.

Jones (juſtice) ſaid, " although it is no ſtatute until the end of the ſeſſions, when the king's aſſent is given, yet when there hath been a ſeſſion, it ſhall have relation to the firſt day of the ſeſſion, that they veſt actually in the king the ſaid fourth day of *February*, 27 *H.* 8. that the king ſhall have the rents incurred after the firſt day, and before the laſt day of the ſeſſion; and if they be paid in the *interim* to the abbot, *&c.* they ſhall be paid again to the king." 4 Ter Rep. B. R. 660.

And they relied upon a judgment in a caſe of *Gerrard* v. *Wright*, where it was held upon ſolemn argument by *Hobart*, *Winch*, and *Hutton*, juſtices, that the *ſtat.* 31. *H.* 8. doth not extend to abbies which came to the king by the *ſtat.* 27. *H.* 8.; and that Jon. 368.

in

in this court, in the caſe of *Whitton* v. *Weſton*, where all the four juſtices agreed that the caſe of *Gerrard* v. *Wright* is good law; and that the abbies which came to the king by 27 *H.* 8. were not within the privilege of 31 *H.* 8. nor to have the benefit of the ſaid ſtatute of 31 *H.* 8.

Berkely (juſtice) inſiſted that this privilege to be diſcharged from Tithes, being a mere ſpiritual privilege, was determined by the diſſolution of the abbies, and tied only to their bodies and perſons; nor can be revived without ſpecial words, which are not in the ſtatutes of 27 *H.* 8. or 31 *H.* 8. and that although the ſtatute of 31 *H.* 8. extend to the ſaid abbies ſuppreſſed by the ſtatute of 27 *H.* 8. yet there is a ſaving in the ſaid ſtatute of 31 *H.* 8. of all rights and intereſts, except to the donors, abbots, *&c.* ſo that the perſons who have right to Tithes are preſerved by this ſaving.

But this point all the juſtices, in their argument, denied; and held that the ſaving any right, *&c.* doth not extend to perſons to ſave their rights againſt ſuch privileges, being againſt the words and intent of this ſtatute.

Wherefore

Wherefore for the reaſons before ſtated, but principally for, that the abbey diſſolved appeared to be ſuppreſſed by the ſtatute of 27 *H.* 8. by the opinion of the ſaid three judges, it was adjudged for the defendant, and a conſultation was awarded.

And in the caſe of *Bolls* v. *Atkinſon*, an abbot had held lands diſcharged of Tithes time out of mind, and it was adjudged the alienee or patentee ſhould be charged with Tithes. 1 Lev. 185. Hob. 248.

The next ſtatute, whereby monaſteries, *&c.* were diſſolved, and their lands given to the crown, is that of 31 *H.* 8. *c.* 13. and wherein it is enacted as follows:

" Where divers and ſundry abbots, " priors, abbeſſes, prioreſſes, and other ec- " cleſiaſtical governors and governeſſes of " the ſaid late monaſteries, abbathies, " priories, nunneries, colleges, hoſpitals, " houſes of friars, and other religious and " eccleſiaſtical houſes and places, have had, " poſſeſſed, and enjoyed divers and ſundry " parſonages, appropriated Tithes, pen- " ſions, and portions, and alſo were ac- " quitted and diſcharged of and for the " payment or payments of Tithes, to be " paid out of, or for their ſaid monaſteries,

" abbathies,

" abbathies, priories, nunneries, colleges,
" hoſpitals, houſes of friars, and other re-
" ligious and eccleſiaſtical houſes and
" places, manors, meſſuages, lands, tene-
" ments, and hereditaments. Be it there-
" fore enacted, by the authority aforeſaid,
" that as well the king our ſovereign lord,
" his heirs and ſucceſſors, as all and every
" ſuch perſon and perſons, their heirs and
" aſſigns, which have, or hereafter ſhall
" have any monaſteries, abbathies, priories,
" nunneries, colleges, hoſpitals, houſes of
" friars, or other eccleſiaſtical houſes or
" places, ſcites, circuits, precincts of the
" ſame, or any of them, or any manors,
" meſſuages, parſonages appropriate, tithes,
" penſions, portions, or other hereditа-
" ments, whatſoever they be, which be-
" longed or appertained, or which now
" belong or appertain unto the ſaid mona-
" ſteries, abbathies, nunneries, colleges,
" hoſpitals, houſes of friars, or other reli-
" gious and eccleſiaſtial houſes or places,
" or unto any of them, ſhall have, hold,
" retain, keep and enjoy, as well the ſaid
" parſonages appropriate, Tithes, penſions,
" and portions of the ſaid monaſteries,
" abbathies, priories, nunneries, colleges,
" hoſpitals, houſes of friars, and other re-
" ligious and eccleſiaſtical houſes and
" places, ſcites, circuits, precincts, manors,

" meaſes,

" meaſes, lands, tenements, and other here-
" ditaments, whatſoever they be, and every
" of them, according to their eſtates and
" titles, diſcharged and acquitted of pay-
" ment of Tithes, as freely and in as large
" and ample manner as the ſaid late ab-
" bots, priors, abbeſſes, prioreſſes, and
" other eccleſiaſtical governors and gover-
" neſſes, or any of them had, held, oc-
" cupied, poſſeſſed, uſed, retained, or en-
" joyed the ſame, or any parcel thereof
" at the days of their diſſolution, ſup-
" preſſion, renouncing, relinquiſhing, for-
" feiting, giving up, or coming to
" the king's highneſs of ſuch monaſteries,
" abbathies, priories, nunneries, colleges,
" hoſpitals, houſes of friars, or other reli-
" gious or eccleſiaſtical houſes or places,
" or at the day of the diſſolution, re-
" nouncing, relinquiſhing, giving up, or
" coming to the king's highneſs, or any
" of them, this act or any thing therein
" contained to the contrary notwithſtand-
" ing."

By this act no religious houſe, *&c.* were ſuppreſſed, only the ſurrenders which were either at that time, or to be made to the crown, were confirmed.

By reaſon of which diſcharge from Tithes, of lands which were given to the king by this act, and which were diſcharged in the hands of the religious, it hath been more ſtrictly enquired, what were the houſes diſſolved by this act, than by any other of the acts of diſſolution, which will beſt appear by the following catalogue:

A CATALOGUE

A CATALOGUE

Of Monaſteries of the yearly Value of 200*l. or upwards, Diſſolved by the Statute of the* 31 H. 8. *and by that means capable of being Diſcharged of Tithes. In which are the following Abbreviations:*

N. B. Ab. *Abbey*; pr. *Priory*; C. Auſt. *Canons of St. Auſtin*; Bl. M. *Black Monks*; Wh. C. *White Canons*; Ben. *Benedictines*; Gilb. *Gilbertines*; Præm. *Præmonſtratenſes*; Carth. *Carthuſians*; Mon. *Monks*; Clun. *Cluniacks*; Ciſt. *Ciſtercians*; T. *in the time of*; ab. *about the year.*

Bedfordſhire.

Monaſteries.	*Order.*	*Founded.*	*Value.*		
			l.	*s.*	*d.*
Newham, pr.	C. Auſt.	T. Hen. 1.	293	15	11
Elmiſton, ab.	Ben.	T. W. Conq.	284	12	11
Warden, ab.	Ciſt.	1139.—	389	16	6
Chickſand, pr.	Wh. C Gill.	T. W. Rufus.	212	3	5
Dunſtable, ab.	C. Auſt.	T. Hen. 1.	344	13	3
Wooburn, ab.	Ciſt.	T. John.	391	18	2

Berkſhire.

Reading,	Ben.	T. Hen. 1.	1938	14	3
Buſleſham, ab.	C. Auſt.	13 Ed. 3.	285	11	0
Abington, ab.	Ben.	720.—	1876	10	9

Buckinghamſhire.

Aſhrugg coll.	C. Auſt.	T. Edw. 1.	416	16	4
Noteley, ab.	C. Auſt.	1112.—	437	6	8
Miſſenden, ab.	Ben.	1293.—	261	14	6

Cambridgeshire.

Monasteries.	*Order.*	*Founded.*	*Value.* *l.*	*s.*	*d.*
Thorney, ab.	Ben.	972.—	411	12	11
Barewell, pr.	C Aust.	1092.—	256	11	10

Cheshire.

St. Worbuge, ab.	Ben.	1095.—	1093	5	11
Combermeer, ab.	Cist.	1134.—	225	9	7

Cornwall.

Bodmin, pr.	C. Aust.	936.—	270	0	11
Launceston, ab.	C. Aust.	T. W. Conq.	354	0	11
St. Germain's ab.	C. Aust.	T. Ethelstan.	243	8	0

Cumberland.

Carlisle, pr.	C. Aust.	T. W. Rufus.	418	3	4
Holme Coltrom, ab.	Cist.	1135.—	427	19	3

Derbyshire.

Darley, ab.	C. Aust.	T. H. 2.	258	14	5

Devonshire.

Ford, ab.	Cist.	1133.—	374	10	6
Newnham, ab.	Cist.	ab. 1246.	227	7	8
Dinkswell, ab.	Cist.	1201.—	294	18	6
Hertland, ab.	C. Aust.	T. H. 2.	306	3	2
Torre, ab.	Præm.	T. Ric. 1.	396	0	11
Buckfast, ab.	Cist.	T. H. 2.	466	11	2
Plimpton, ab.	Cist.	T. Edw. 1.	241	17	9
Tavistock, ab.	Ben.	961.—	902	5	7
Exon, pr.	Clun.	T. Hen. 1.	502	12	9

Dorſetſhire.

Monaſteries.	*Order.*	*Founded.*	*Value.* *l.*	*s.*	*a.*
Abbotſbury,	Ben.	ab. 1016.	390	19	2
Middleton, ab.	Ben.	T. Ethelſtan.	538	13	11
Tarrent, ab.	Ciſt.	By Henry 3.	214	7	9
Stafton, ab.	Ben.	941.—	1166	8	9
Cerne, ab.	Ben.	T. Edgar.	515	17	10
Sherburn, ab.	Ben.	ab. 370.—	682	14	7

Durham.

S. Cuthbert, ab.	Ben.	ab. 842.	1366	10	9
Tinmouth, pr.	Ben.	— —	397	11	5

Eſſex.

Berking, ab.	Ben.	680.—	862	12	5
Stratford Langthorn, ab.	Ciſt.	1135.—	511	16	3
Waltham, ab.	C. Auſt.	ab. 1060.	900	4	3
Walden, ab.	Ben.	1136.—	372	18	11
St. Oſwith, ab.	C. Auſt.	1120.—	677	1	2
Colcheſter, ab.	C. Auſt.	T. Hen. 1.	523	17	0

Gloucesterſhire.

Briſtol, ab.	C. Auſt.	T. Hen. 1.	670	13	11
Hayles, ab.	Ciſt.	1246.—	357	7	8
Winchcomb, ab.	Ben.	787.—	759	11	9
Tewkeſbury, ab.	Ben.	715.—	1598	1	5
Cirenceſter, ab.	C. Auſt.	T. H. 1.	1051	7	11
King's-wood, ab.	Ciſt.	1139.—	244	11	2
Glouceſter, ab.	Ben.	680.—	1946	5	9
Lanthony, pr.	C. Auſt.	1136.—	641	19	11

Hampſhire.

Monaſteries.	*Order.*	*Founded.*	*Value.* l.	s.	d.
St. Swithin's Winton, ab.	Ben.	634.—	1507	17	2
Hyde, ab.	Ben.	by Alfred.	865	18	0
Wherwell, ab.	Ben.	by Edgar.	339	8	7
Romſey, mon.	Ben.	907.---	393	10	10
Twinham, pr.	C. Auſt.	before 1042.	312	7	0
Belloloco, ab.	Ciſt.	1024.---	326	13	2
Southwick, pr.	C. Auſt.	T. H. 1.	257	4	4
Titchfield, ab.	Præm.	T. H. 3.	249	16	1

Hertfordſhire.

St. Alban's, ab.	Ben.	755.—	2102	7	1

Huntingdonſhire.

St. Neot's, ab.	Ben.	ab. T. Hen. 3.	241	11	4
Ramſey, ab.	Ben.	969.---	1716	12	4

Kent.

St. Auſtin's, Cant.	C. Auſt.	605.—	1413	4	11
Ledis, pr.	C. Auſt.	1119.—	362	7	7
Feverſham, ab.	Clun.	1147.—	286	12	6
Boxley, ab.	Ciſt.	1144.—	204	4	11
Roffen, ab.	Ben.	600.—	486	11	5
Mallin, ab.	Ben.	by Edmund.	218	4	2
Dartford, ab.	C. Auſt.	1372.—	380	0	0

Lancaſhire.

Whalley, ab.	Ciſt.	1172.	321	9	1

Leiceſter-

Leiceſterſhire.

Monaſteries.	*Order.*	*Founded.*	*Value.* *l.*	*s.*	*d.*
Leiceſter, ab.	C. Auſt.	1143.—	951	14	5
Croxdon, ab.	Præm.	ab. R. 1.	381	0	10
Launda, ab.	C. Auſt.	T. W. Rufus.	399	3	3

Lincolnſhire.

Lincoln, St. Cath. pr.	Gilb.	T. H. 2.	202	5	0
Kirkſteed, ab.	Ciſt.	1139.—	286	2	7
Reveſley, ab.	Ciſt.	1142.—	287	2	4
Thorton, ab.	C. Auſt.	1139.—	594	17	10
Barney, ab.	Ben.	712.—	366	6	1
Croyland, ab.	Ben.	716.—	1803	15	10
Spalding, ab.	Ben.	1052.—	761	8	11
Sempringham, ab.	Gilb.	1148.—	317	4	1
Epworth, mon.	Carth.	1386.—	237	15	1

London and Middleſex.

St. John Jeruſalem,	——	1000.—	2385	12	8
St. Barth. Smithfield,	C. Auſt.	1102.—	653	15	0
St. Mary Biſhopſgate,	pr.	1187.—	478	6	6
Clerkenwell, pr.	Ben.	T. Stephen.	262	19	0
London minors,	Ben.	T. Edw. 1.	318	8	5
Weſtminſter, ab.	Ben.	T. Edgar.	3471	0	2
Sion, ab.	C. Auſt.	by Hen. 5.	1731	8	4
London, a houſe of,	Carth.	T. Edw. 3.	642	0	4
St. Clare without Aldgate, mon.	——	1292.—	418	8	5
St. Mary, Charterhouſe, mon.	Carth.	1379.—	736	2	7
St. John, Holiwell,	Bl. M.	1318.—	347	1	4
St. Mary, Eaſt-Smithfield, ab.	Ciſt.	1360.—	602	11	10

Norfolk.

Monaſteries.	*Order.*	*Founded.*	*Value.* l.	s.	d.
Thetford, ab.	Clun.	1103.—	312	14	4
Wymundham, ab.	Ben.	1139.—	211	16	6
Hulmo, ab.	Ben.	by Canute.	583	17	0
Weſtderham, ab.	Præm.	T. Hen. 2.	228	0	0
Walſingham, ab.	C. Auſt.	ab. T. Stephen.	391	11	6
Caſtle-acre, ab.	Clun.	1067.—	306	11	4
Weſt-acre, ab.	Clun.	T. W. Rufus.	260	13	7

Northamptonſhire.

Burg. St. Peter, ab.	Ben.	by Roſerek of Mercia.	1721	14	0
Pipewell, ab.	Ciſt.	1143.—	286	11	8
St. Andrews, pr.	Clun.	1067.—	263	7	1
Sulby, ab.	Præm.	T. Stephen.	258	8	5

Nottinghamſhire.

Lenton, pr.	Clun.	T. H. 1.	329	5	10
Thuragarton, pr.	C. Auſt.	T. H. 1.	259	9	4
Welbeck, ab.	C. Auſt.	T. Stephen.	249	6	3
Warſop, pr.	C. Auſt.	— —	239	10	5
Bella Valla, pr.	Carth.	ab. 16. Ed. 3.	227	8	0
Newſtead, p.	C. Auſt.	T. Ed. 3.	219	18	8

The two laſt are under-valued in Dugdale, but thus by Speed.

Northumberland.

Tinmouth, a cell to St. Alban's, a nunnery,			511	4	1

Oxfordſhire.

Godſtow, ab.	Ben.	T. Stephen.	274	5	10
Eyneſham, ab.	Ben.	by Etheldred.	441	12	2
Oſney, ab.	Ciſt.	T. H. 1.	654	10	2
Thame, ab.	Ciſt.	T. H. 1.	256	13	11
Oxford, pr.	— —	before Conq.	224	4	8
Dorcheſter, ab.	C. Auſt.	635.—	219	12	0

Shrop-

Shropſhire.

Monaſteries.	*Order.*	*Founded.*	*Value.* l.	s.	d.
Haghmond, ab.	C. Auſt.	1000.—	259	13	7
Lilleſhull, ab.	C. Auſt.	by Elfledak of Mercia.	229	3	1
Wigmore, ab.	C. Auſt.	1172.—	267	2	10
Wenlock, pr.	Clun.	1181 or before.	401	0	7
Salop, ab.	C. Auſt.	1081.—	615	4	3
Hales Owen, ab.	Præm.	T. John.	337	15	6

Somerſetſhire.

Glaſſenbury, ab.	Ben.	about 300.	3311	7	4
Brewton, ab.	C. Auſt.	ab. T. Conq.	439	6	8
Henton, pr.	Carth.	T. Hen. 3.	248	19	2
Witham, pr.	Carth.	by Hen. 2.	215	15	0
Taunton, pr.	C. Auſt.	T. Hen. 1.	286	8	10
Bath, pr.	Ben.	T. Hen. 3.	617	2	3
Keyneſham, ab.	C. Auſt.	T. Hen. 1.	419	14	3
Michelney, ab.	Ben.	740.—	447	4	11
Backland, pr.	Ciſt.	T. Edw. 1.	223	7	4

Staffordſhire.

Dela Cres, ab.	Ciſt.	1153.—	227	5	0
Burton-upon-Trent,	Ben.	T. Eadred.	267	14	3
Croxden, ab.	Ciſt.	— —	—	—	

Suffolk.

St. Edmunſbury, ab.	Ben.	1020.—	1659	13	11
Butley, ab.	C. Auſt.	1171.—	318	17	2
Sibeton, ab.	Ciſt.	1150.—	250	15	7
Ixworth, ab.	C. Auſt.	T. W. Conq.	280	9	5

Surrey.

Surrey.

Monaſteries.	*Order.*	*Founded.*	*Value.* l.	s.	d.
Merton. pr.	C. Auſt.	1414.—	957	19	5
Shene, pr.	Carth.	1414.—	777	12	0
Chertſey, ab.	Ben.	666.—	659	15	8
Newark, pr.	——	— —	258	11	11
St. Maryovers, ab.	C. Auſt.	1106.—	625	6	6
Burmondſey, ab.	C. Auſt.	1106.—	474	14	4

Suſſex.

Lewis, ab.	Clun.	T. W. Rufus.	920	4	6
Robert's Bridge, ab.	Ciſt.	T. Hen. 2.	248	10	6
Bataille, ab.	Bl. M.	1066.—	987	0	11

Warwickſhire.

Combe, ab.	Ciſt.	T. Stephen.	311	15	1
Kenelworth, ab.	C. Auſt.	T. Hen. 1.	538	19	0
Meryval, ab.	Ciſt.	1148.—	254	1	8
Nuneaton, mon.	Ben.	T. Hen. 2.	253	14	5

Wiltſhire.

Malmſbury, ab.	Ben.	ab. 670.—	803	17	7
Bradonſtoek, pr.	C. Auſt.	T. W. Conq.	212	19	3
Edington, pr.	C. Auſt.	1352.—	442	19	7
Ambreſbury, ab.	Ben.	1177.—	494	15	2
Wilton, ab.	Ben.	T. Ethelwolf.	601	1	1
Fairly, a cell to Lewis,	Clun.	1125.—	217	0	4
Laycock, ab.	C. Auſt.	1232.—	203	12	3

Worceſterſhire.

Monaſteries.	*Order.*	*Founded.*	*Value.* *l.*	*s.*	*d.*
Malverne, ab.	Ben.	1083.—	308	1	9
Eveſham, ab.	Ben.	T. Offa.	1183	12	3
Perſhore, ab.	Ciſt.	— —	643	4	5
Hales Owen, ab.	Præm.	T. John.	282	13	4
Bordeſly, ab.	Ciſt.	1138.—	388	1	1

Yorkſhire.

St. Mary, York, ab.	Ben.	1088.—	1550	7	0
Selby, ab.	Ben.	T. W. Conq.	720	12	10
Kirkſtal, ab.	Ciſt.	1147.—	329	2	11
De Rupe, ab.	Ciſt.	1147.—	224	2	5
Monks Burton, ab.	Clun.	ab. 1186.	239	3	6
Noſtel, ab.	C. Auſt.	T. Hen. 1.	492	18	2
Pomfrait, ab.	Clun.	T. W. Conq.	327	14	8
Giſbourn, ab.	C. Auſt.	T. Stephen.	628	3	4
Whitby, ab.	Ben.	T. W. Conq.	437	2	9
Montegratia, ab.	Carth.	ab. 1396.	323	2	10
Newburge, pr.	C. Auſt.	1145.—	367	8	3
Belland, ab.	Ciſt.	1134.—	238	9	4
Kirkham, ab.	C. Auſt.	T. Hen. 1.	269	5	9
Melſa, ab.	Ciſt.	1136.—	299	6	4
Brilington, ab.	C. Auſt.	T. Hen. 1.	547	6	11
Walton, ab.	Gilb.	T. Stephen.	360	16	10
Bolton in Craven, pr.	C. Auſt.	T. Hen. 1.	212	3	4
Rival, ab.	Ciſt.	1132.—	278	10	2
Jerval, ab.	Ciſt.	T. Stephen.	234	18	5
Furnes, ab.	Ciſt.	1127.—	805	16	5
De Fontibus,	Ciſt.	1132.—	998	6	8
Warter, pr.	C. Auſt.	T. Hen. 1.	221	3	10
Richal.	— —	T. Stephen.	257	7	0
St. Michael near Hull.	Carth.	1377.—	231	17	3

In Wales.

Monasteries.	*Order.*	*Founded.*	*Value.* l.	s.	d.
Valle de Sancta Cruce in Denbighshire,	Cist.	T. Edw. 1.	214	3	5
Strata Florida in Cardiganshire,	Cist. or Clun.	T. W. Conq.	1226	6	0

In

In this chapter, abbies, priories, monks, canons, *&c.* having been ſeveral times mentioned, and more particularly in the ſtatutes for their diſſolution, ſuppreſſion, *&c.* I ſhall for the better underſtanding the different terms made uſe of (digreſſing a little from the original plan of this work) endeavour briefly to explain them, being well convinced that the candid reader will excuſe the digreſſion when done with ſuch good intentions.

An *Abbey* was a ſociety of religious people, having an abbát or abbeſs to preſide over them; and ſome of theſe were ſo conſiderable, that the abbats of them were called to parliament, and had ſeats and votes in the houſe of lords; and the number of them, as ſettled by *Edward* the firſt, were twenty-ſeven abbats, and two priors; ſo that there were twenty-nine in all, and no more, that ſtatedly and conſtantly enjoyed this privilege, *viz.*

The Abbat of *Tewſkeſbury*, the Prior of *Coventry*, the Abbats of *Waltham*, *Cirenceſter*, *St. John*'s (at *Colcheſter*), *Croiland*, *Shrewſbury*, *Selby*, *Bardney*, *St. Bennet*'s of *Hulme*, *Thorney*, *Hide*, *Winchelcombe*, *Battel*, *Hide*, *Reading*, *St. Mary*'s (in *York*) *Ramſey*, *Peterburgh*, *St. Peter*'s (in *Glouceſter*) *Glaſtonbury*,

tonbury, *St. Edmund*'s *Bury*, *St. Auſtin*'s (in *Canterbury*) *St. Alban*'s, *Weſtminſter*, *Abingdon*, *Eveſham*, *Malmſbury*, and *Taviſtock*; and the Prior of *St. John of Jeruſalem*.

A *Priory* was a ſociety of religious, where the chief perſon was termed a prior or prioreſs; and, as before obſerved, two of the priors had ſeats in parliament.

Frieries were houſes erected for the habitation of friers. Friers by their profeſſion were mendicants, and to have no property; but moſt of their houſes had ſome ſhops and gardens belonging to them.

The *Benedictine Monks* were inſtituted by *St. Benedict*, or *Bennet*, at *Nurſia*, in the kingdom of *Spolet*, in *Italy*, about the year 480; and were introduced into *England* about the year 596; and, from the colour of their outward habit, were generally called *Black Monks*.

The *Cluniacks* were eſtabliſhed by *Odo*, abbot of *Cluni*, about the year 912; and the *Cluniacks* were the firſt and principal branch of the *Benedictines*. They were introduced into this realm about the year 1077.

The

The *Carthuſians* were alſo a branch of the *Benedictines*, and were inſtituted by *Bruno*, who firſt eſtabliſhed this order at *Chartreux*, (*Cartuſia*) in the dioceſe of *Grenoble*, in *France*, about the year 1080. They were brought into *England* about the year 1180. Their houſes were called *chartreux-houſes*, which by corruption have degenerated into *charter-houſes*.

The *Ciſterians*, or *Ciſteauſe*, another branch of the *Benedictines*, were firſt eſtabliſhed at *Ciſtertium*, in the biſhoprick of *Chalons*, in *Burgundy*, (from whence they derive their name) by *Robert*, abbot of *Moleſme*, in the year 1098. They were alſo called *Bernardines*, from *St. Bernard*, a great promoter of their order. And from the colour of their habit, they were likewiſed ſtiled *White Monks*. They firſt came into *England* in the year 1128.

Beſides the *Monks*, there were *Canons*, which were of two ſorts: *Regular* and *Secular*.

Regular Canons were ſuch as lived under ſome rule, and were obliged to obſerve the ſtatutes of their order.

Secular

Secular Canons, were ſo called becauſe they converſed *in ſeculo*, abroad in the world performed ſpiritual offices to the laity, took upon them the care of ſouls, and differed in nothing almoſt from the common prieſts, ſave that they were under the government of ſome local ſtatutes.

The *Canons of St. Auguſtine*, who was biſhop of *Hippo* in the year 395. They were introduced into *England* about the year 1105. From their habit they were called *Black Canons Regular of St. Auſtin.*

The *Præmonſtratenſes* were canons eſtabliſhed by *St. Norbet*, about the year 1120, at *Præmonſtratum*, in *Picardy*. They were brought into *England* about the year 1140.

The *Sempringham* or *Gilbertine Canons* were inſtituted by *St. Gilbert*, at *Sempringham*, in *Lincolnſhire*, about the year 1148. *St. Gilbert* himſelf founded thirteen monaſteries of this order, *viz.* four for men alone, and nine for men and women together, which had in them 700 brethren, and 1500 ſiſters.

It muſt be obſerved, that all the monaſteries, priories, and other religious houſes, which were not above the clear yearly value of

of two hundred pounds, were not diſſolved by the ſtatute of 27 *H.* 8. *c.* 28. although they might have been, but ſome of them by this ſtatute 31 *H.* 8. and the reaſon is, becauſe there was a *proviſo* in ſtat. 27 *H.* 8. that notwithſtanding that act, the king might, by his letters patent under the great ſeal of *England*, continue any of the ſaid monaſteries.

Therefore ſuch of them as were continued by the king's letters patents, are not to be looked upon as diſſolved by ſtatute 27 *H.* 8. but by ſtat. 31 *H.* 8. and the lands belonging to them, that were held Tithe-free before their diſſolution, remain ſo by force of the aforeſaid clauſe in the ſtatute 31 *H.* 8.

And in the caſe of *Walklute* v. *Wilſhaw:* the plaintiff was farmer of the rectory of *Uttoxeter*, in the county of *Stafford*, and the defendant, *Wilſhaw*, was owner of a farm in that pariſh, formerly belonging to the abbey of *Croxden*, (a ſmall abbey of the *Ciſtertian* order) which *Wilſhaw* (in order to be diſcharged of Tithes) ſhewed to be continued by letters patent, and not diſſolved but by ſtat. 31 *H.* 8. Deg. p. 2. c. 21.

Although the king after the diſſolution of the leſſer monaſteries (which had been of any of the orders that were diſcharged from the payment of Tithes) had granted any of their lands to any of the greater monaſteries, that were not diſſolved till the ſtatute 31 *H.* 8.; yet thoſe ſhall not retain the privileges the abbots had at the time of the former diſſolution. For upon the diſſolution of the corporation to which they belonged, they immediately became Tithable, and ſo could not be held by the greater abbies more free than the king, their donor, had them; and, by conſequence, though they came the ſecond time to the king by 31 *H.* 8. yet they came to him as the abbey held them, *viz.* ſubject to Tithes, and the clauſe of diſcharge therein doth not extend to them.

Watſ. c. 48.
Deg. p. 2. c. 21.
Hob. 307.
1 Jon. p. 2.
2 Cro. 607.

Nor muſt we underſtand that all the other lands belonging to the greater monaſteries diſſolved by 31 *H.* 8. or of the leſſer monaſteries continued by the king's letters patents, and ſo alſo diſſolved by the ſame ſtatute, are diſcharged from the payment of Tithes, but only ſuch of them as were held abſolutely diſcharged by the religious perſon that did enjoy them before the diſſolution; and of theſe, ſome were held abſolutely diſcharged, others diſcharged only while

while they did remain in the actual occupation and manurance of the owners thereof.

In a caſe, *Dyer* 349:---A parſon ſued for the Tithe of hay and grain of the demeſnes of a manor within a pariſh, of which the dean and chapter of *P.* after the diſſolution of the monaſteries, were owners, in regard that within the time whereof the memory of man was not to the contrary, before the diſſolution, and at the time of the diſſolution of the abbey to which the manor, *&c.* formerly did belong, no ſuch Tithes, but only other Tithes, as wool, lamb, *&c.* were paid by the farmer, at leaſe or at will, being lay perſons. It was ſaid by the juſtices and clerks of the court, that prohibitions in this caſe, upon the *ſtat.* 31 *H.* 8. by virtue of the word "diſcharged," were very ordinary.

And from the laſt cited caſe it appears, that ſuch lands as are free in either reſpect, *i. e.* ſo that no Tithes ſhall be paid of ſuch lands, or that none ſhall be paid of this or that ſort of Tithe, are abſolutely freed from the payment thereof, ſo as the freedom extends not only to the owner, but alſo to his farmers, tenants, and occupiers under him.

And yet not all that receive any profits from the lands belonging to a manor freed as aforeſaid, ſhall be underſtood to be farmers, tenants, or occupiers; for if one or more perſons have *libertatem falcandi* to make hay only, or alſo to put their cattle on lands that belong to ſuch manors as appendant to their houſes, *&c.* they are but commoners, and not farmers or occupiers, becauſe what is taken as a profit *apprender*; therefore if a preſcription was, that the abbot, his farmers, tenants, and occupiers of the lands, ſhould be diſcharged of the Tithes of the lands where ſuch commoners had ſuch privileges, it ſhall not be extended to them.

2 Bulſt. 248.
1 Roll. Rep. 53.
S. C.

Theſe titles of diſcharge were indeed by time for the moſt part loſt, and ran out into preſcriptions, and from hence all other preſcriptions *de non decimando* are ſuppoſed to have their beginning, ſo that it is needleſs when a diſcharge is to be ſhewed, to ſet forth other original thereof, than that they were diſcharged by preſcription, or that they were held by ſuch monaſteries, diſſolved by 31 *H.* 8. time whereof, *&c.* freed from the payment of Tithes, for it ſhall be preſumed that it was by lawful means.

1 Leon. 241.

It

It has been held, that in a declaration upon a prohibition, the plaintiff ought to ſhew not only, that the abbot held the lands diſcharged at the time of the diſſolution, but alſo how he held the ſame ſo diſcharged: For that the *Statute* 31. *H.* 8. ſaith, in as large and ample manner as the abbot held, *&c.* Beſides ſuch a claim of diſcharge from Tithes is contrary to common right; and therefore ſhall be taken ſtrictly, by *Hobart*, *Hutton*, and *Winch*, Juſtices; againſt *Warburton*. Noy. 97. 1 Jon. 6. Hob. 295.

Alſo a diſcharge, either by compoſition, bull, or grant, muſt appear only by preſcription, and if it ſo appear, as to lands given by 31 *H.* it ſhall be allowed at this day. Jones 368.

In *Branche's* caſe, it is ſaid, that if an abbot or prior were ſeized of lands diſcharged of Tithe, he that is now farmer of ſuch land, ſhall be permitted to preſcribe in *non decimando*, by the *ſtatute* of 2 *Ed.* 6, which wills that none pay Tithes otherways than they were paid forty years before, but in no other caſe ſhall a man preſcribe in *non decimando*, but only in *modo decimandi*. Moor. 219.

It muſt be obſerved, that no abbot or prior could make any ſuch preſcription in *non decimando*, that was not founded before

2 Roll. Abr. 269. 3 Keb. 45. 217 Raym. 225.

time of memory, that is before the firſt year of the reign of *Richard* the firſt.

Alſo by *ſtatute* 2, *H.* 4, *c.* 4: It has been enacted, "That no perſon, religious nor ſecular, of what eſtate or condition that he be, by colour of any bulls, containing ſuch privileges to be diſcharged of diſmes, pertaining to pariſh churches, prebends, hoſpitals, or vicarages, purchaſed before the firſt year of King *Richard* the ſecond, after the conqueſt or ſithence, not executed, ſhall put in execution any ſuch bulls ſo purchaſed, or any ſuch bulls to be purchaſed in time to come; and if any ſuch religious or ſecular perſon, of what eſtate or condition he be, from henceforth by colour of ſuch bulls, do trouble any perſon of holy church, prebendaries, wardens of hoſpitals, or vicars, ſo that they cannot take or enjoy the diſmes due or pertaining to them of their ſaid benefices, that then ſuch diſturbers ſhall incur like proceſs and pain, as is ordained by the *ſtatute* made againſt them of the order of *Ciſteaux*, in the ſecond year of our ſaid lord the king that now is."

Præmunire.

By which *ſtatute* it appears, that as the lands of churches founded ſince the time of *Richard* 1 as aforeſaid, cannot plead preſcription

tion for an abſolute diſcharge of Tithes, ſo neither by reaſon of this *ſtatute*, can any pope's bull, purchaſed before the making thereof, or after, be pleaded as a ground of an abſolute diſcharge, *viz.* not only for the owners whilſt occupied by themſelves, but alſo for their farmers, tenants, or occupiers, whether the eſtate was belonging to any religious perſons, or did, or at this day doth belong to any of the ſecular clergy; yet I ſuppoſe that a real compoſition, if it can be ſhewed, may be a ſufficient diſcharge that is, if it was made ſince this ſtatute, or ſince the time of limitation of preſcriptions, provided that it was alſo made before *ſtatute* 1 *Eliz.* where the Tithes did belong to a biſhop, or before 13 *Eliz.* where they did belong to any college, dean, dean and chapters, archdeacon, prebend, parſon, vicar, *&c.* Wats, c. 48.

But though a preſcription *de non decimando*, without the aid of an act of parliament, is ſaid *ſupra* to periſh when a ſpiritual corporation is diſſolved, and the lands come to a lay hand; yet by reaſon of the direct and pregnant clauſe in the ſaid *ſtatute* 31. *H.* 8. a preſcription in *non decimando* is allowed to be of that force, that where any of the lands belonging to the monaſteries, *&c.* diſſolved by 31. *H.* 8. were within the pariſhes whoſe

churches were appropriated to any of the ſaid monaſteries, ſo that the ſaid monaſtery was ſeized both of the ſaid lands and rectory *ſimul et ſemel*, time out of mind, and paid no Tithes within the memory of man for the lands, ſuch lands ſhall be diſcharged of Tithes by ſuch perpetual unity of poſſeſſion, as was adjudged, in the Archbiſhop of *Canterbury's* caſe, 2 *Co.* 47. *Benton*, v. *Trot. Moor.* 528. 4. *Leon.* 47.

The lands (as before obſerved) which before the diſſolution, were generally held to be diſcharged from the payment of Tithes, were ſuch lands as were held by the orders of the *Ciſtertians*, *Hoſpitalers*, and *Præmonſtrants*.

Brownl. and Gold. 2 p. 8.

Nor were all the houſes of thoſe orders, not ſurrendered or diſſolved, *&c.* by the *Statute* 27. *H.* 8. diſſolved or ſurrendered by force of the *Statute* 31. *H.* 8. For thoſe of the hoſpital of *St. John*, of *Jeruſalem*, were diſſolved by the *Statute* 32. *H.* 8. *c.* 24. and not before: and theſe lands cannot be privileged from their payment of Tithes, by 31. *H.* 8.

According to the conſtruction of 31. *H.* 8. as appears in *Bendlo.* 164. the lands of ſuch

as

as were thereby diſſolved, ſhall be free from the payment of Tithes, ſo far only as they were free in the hands of the churchmen, *viz.* whilſt they ſhall be in the hands and manurance of the owners thereof; it is therefore neceſſary for the party who pretends to have advantage of this privilege, expreſsly to ſhew and aver, that the lands are in his hands and manurance, for to ſay, that he is ſeiſed of the land is not ſufficient, for he may be ſeiſed thereof, and yet another may manure them.

Alſo if the lands of ſuch orders ſo privileged were in leaſe for years at the time of their diſſolution, and for certain years before, yet the lay owners ſince the diſſolution ſhall hold them diſcharged whilſt manured by themſelves, for although the farmer paid Tithes at the time of the diſſolution, yet as to the abbot the inheritance was then diſcharged of Tithes, and the king or his patentee ſhall have and hold it diſcharged as the abbot held it. 2 Cro. 559. Hardr. 190.

In the caſe of *Farmer*, v. *Sherman*. An abbot having ſuch privilege, had in the time of *Ed.* 4. made a gift in tail, though the abbey was diſſolved by the 31. *H.* 8. It was re- Hetl. 133. Hob. 248. S. C.

ſolved,

ſolved, that by the clauſe of the diſcharge of Tithes in the aforeſaid ſtatute, the donor and his heirs ſhould not be diſcharged of Tithes, for the ſtatute diſchargeth none but as the abbot was diſcharged at the time of the diſſolution, ſo that they muſt claim the eſtate and diſcharge under the abbot, but if by a common recovery, the reverſion had been barred before or after the ſtatute, or if that the land had returned to the abbot, or king, before or after the ſtatute, the caſe had been otherwiſe.

And whilſt the king's title to ſuch lands doth remain, ſo that they be manured by his farmers, or tenants for years, or at will, no Tithes ſhall be paid of them, although Tithes of them ſhould have been paid by the farmers or tenants of the abbots or priors that had them, at the time of diſſolution; and the reaſon given is, becauſe the king himſelf cannot manure them.

But if the king having ſo leaſed them, *&c.* grants over the reverſion, or doth ſell them, there the farmer ſhall pay Tithes, by *Manwood*. But *Tanfield* ſaid, that the king's tenants, for life or years, ſhould not be free in the former caſe, but only his tenant at will.

2 Leon. 71. Owen 56. S. C.

Moor 915.

And

And it was agreed, *per cur.* that the king's patentee is to be intended of the king's farmers, and not his patentees in fee. 2 Keb. 29. 1 Lev. 185.

In *Hard.* 315. it is ſaid, that if the king alien any of the lands whereof he is diſcharged of Tithes, his patentee ſhall pay Tithes; and not only ſo, but the præſcription is deſtroyed for ever, though the ſame lands ſhould afterwards come into the king's hands again by eſcheat or otherwiſe.

But in the caſe of *Stonehouſe* v. *Read*, it was adjudged that the reverſioner and king's patentee, and their aſſigns, ſhall have the ſame privilege the abbot had, *viz.* to hold them free whilſt in his own hands, and manured by him, and not let or manured by another. Bendl. 143.

The next ſtatute after 31 *H.* 8. for the diſſolution of religious houſes, *&c.* was 32 *H.* 8. *c.* 24. which was made on purpoſe to diſſolve the hoſpitals of *St. John of Jeruſalem*, in *England* and *Ireland*, either for that (as ſome think) thoſe of this order had power to purchaſe, but not to ſurrender; or, becauſe they were beyond ſea at this time, and would not, nor could not be compelled to ſurrender as other religious houſes did, whoſe poſſeſſions therefore are at this day

day held Tithe-free, as the ſpiritual men hold them; by virtue of the *ſtat.* 31 *H.* 8. although ſurrendered after the ſaid ſtatute was made.

And without queſtion, the lands of the hoſpitals of *St. John of Jeruſalem*, and the *Templars* lands, given to them by *ſtat.* 17. *Edw.* 2. would have been likewiſe freed from the payment of Tithes, had they been ſurrendered as others were, and not diſſolved by ſpecial act of parliament, *viz.* 32. *H.* 8. upon which great doubts have ariſen whether they ſhall be held Tithe-free by the king and his patentee, as the religious corporations held them, *viz.* whilſt they are manured by the owners thereof. As to which doubt two queſtions have ariſen, *viz.*

Firſt, Whether by the *ſtat.* 31 *H.* 8. thoſe lands were diſcharged of Tithes? and,

Secondly, If not, whether they were ſo diſcharged by this ſtatute of 32 *H.* 8.?

In a caſe in *Dyer* 277: The Prior of *St. John's of Jeruſalem* had made a leaſe for years of a manor, two or three years before the diſſolution, and the leſſee did pay Tithes to the church of *Rocheſter* propriatory; and after the diſſolution, the king granted

granted the reverſion thereof in as ample a manner as the prior had the ſame. It was held in chancery by the lord chancellor, and *Saunders*, *Southcote*, and *Dyer*, juſtices, upon conſideration of the ſaid *ſtat.* 31 *H.* 8. *c.* 13. that after the lands come to the hands of the reverſioner, they ſhall be diſcharged from the payment of Tithes until they be let out to others to farm.

After this the caſe was, upon a ſuit for the Tithes of lands formerly belonging to the *Templars*, and which came to the crown by the diſſolution of the ſaid hoſpital of *St. John of Jeruſalem*, as all the lands formerly the *Templars* did among others, it was held, that the patentee of ſuch lands ſhould not crave the privilege to be diſcharged from paying Tithes in reſpect thereof; for by the common law, a lay perſon was not capable of this privilege. And if ſuch lands had come to the king by the relinquiſhment or diſſolution of any monaſtery, the king ſhould not have had the benefit of this privilege until the ſtatute of 31 *H.* 8. And by that ſtatute it is appointed, that all monaſteries, abbies, *&c.* which before had come, or afterwards ſhould come to the king by ſuppreſſion, ſurrender, *&c.* the king ſhould have in ſuch manner and form, *&c.* and that he ſhould have them diſcharged from

from the payment of Tithes, as the abbots, *&c.* So as the makers of that law intended, that by the firſt clauſe, without the laſt, the king ſhould not hold them diſcharged, therefore they added that clauſe.

But this ſtatute extends only to ſuch poſſeſſions which came to the king by ſurrender, *&c.* and ſhould be veſted in him by force of the ſaid act, and doth not extend to poſſeſſions which veſted in him by another act of parliament, according to the rule laid down in the Archbiſhop of *Canterbury*'s caſe, 2 *Co.* 46. And theſe lands were given to the king by a ſpecial act of parliament, 32 *H.* 8. which hath the ſame words in the firſt clauſe as the act of 31 *H.* 8. hath, but hath not the ſecond; therefore there is no clauſe of holding them diſcharged from Tithes. And it was adjudged accordingly in the caſe of *Cornwallis* v. *Spurring*, 2 *Cro.* 57. *Hil.* 44. *El.* and in the ſame term a like judgment was between the ſame parties, in a prohibition upon a demurrer.

Moor. 913.

In *Urrey* and *Bowyer*'s caſe, it was held by *Coke* and *Nichols*, againſt *Winch* and *Warburton*, that a purchaſer of lands of *St. John of Jeruſalem* ſhould pay Tithes; and in the 18th *Jac.* all the judges but *Warburton*

2 Brownl. 8, 20.

burton held, that the purchaſer ſhould pay Tithes. Godb. 392. c. 13.

After which the caſe was argued *ſeriatim* at the bench by all the four judges in *B. R.* And *Whitlock* held that the lands were not diſcharged of Tithes, neither by the 31ſt of *H.* 8. nor by the 32d of *H.* 8. *Hide*, chief juſtice, held that they were diſcharged by 32 *H.* 8. and not by 31 *H.* 8. And *Dodderidge* and *Jones* held that they were diſcharged by the clauſe of diſcharge in 31 *H.* 8. or if not by that, yet by 32 *H.* 8. So that of the four judges, only *Whitlock* held that ſuch lands were not freed from the payment of Tithes; and therefore judgment was given that no Tithes ſhould be paid of ſuch lands, *viz.* whilſt manured by the king or his patentee, and not let to others. 1 Jon. 182. Latch. 89.

And in the caſe of *Foſett* v. *Franklin*, this matter came again into queſtion in the king's bench, at the time when Sir *Matthew Hale* ſat as chief juſtice, and it was adjudged by him and the whole court that the lands which came to the crown by the *ſtat.* 32 *H.* 8. *c.* 24. ſhould not pay Tithes, by reaſon of the word "privilege, *&c.*" in that ſtatute. And in the argument of this caſe, all the caſes beforementioned were cited and 3 Keb. 208, 217. Raym. 225.

and conſidered, whereby that queſtion ſeems fully determined.

The king having obtained all the greater and leſſer monaſteries, and the hoſpital of *St. John of Jeruſalem*, the parliament proceeded to diſſolve, and give away the lands to the king belonging to chaunteries and free chapels, for which end the ſtatutes of 37 *H.* 8. *c.* 4. and 1 *Ed.* 6. *c.* 14. were enacted, but I find no caſe of law adjudged, or mentioned in the books concerning the lands that came to the crown by *ſtat.* 37 *H.* 8.
Watſ. c. 48. but only upon thoſe that came by *ſtat.* 1. *Ed.* 6. which ſeems to be the ſame, and therefore I ſuppoſe the law is the ſame as to both.

The reaſon why we have no caſes reported on 37 *H.* 8. *c.* 4. appears in *Raſtall*'s abridgment of the ſtatutes, *Tit. Monaſteries*, where he ſays that this act was, "that all colleges, chaunteries, free chapels, *&c.* ſhould be in the king's diſpoſition during his life only; in which were divers articles concerning thoſe chaunteries, *&c.* But king *Henry*, during his life, did not much by force of that act; and therefore I have not put that act in this collection, it expiring with the king's life."

By

By the *ſtat.* 1. *Ed.* 6. *c.* 14. it is enacted as follows, *viz.* " That all manner of col-
" leges, free chapels, and chaunteries, hav-
" ing, being, or *in eſſe*, within five years
" next before the firſt day of this preſent
" parliament, which were not in the actual
" and real poſſeſſion of the late king, nor
" in the actual and real poſſeſſion of the
" king that now is, nor excepted in the
" ſaid former act in the form aforeſaid,
" (*viz.* the ſaid 37 *H.* 8.) other than ſuch
" as by the king's commiſſions, in form
" hereafter mentioned, ſhall be altered,
" tranſported, or changed; and all manors,
" lands, tenements, rents, Tithes, pen-
" ſions, portions, and other hereditaments
" and things abovementioned, belonging to
" them, or any of them; and alſo all
" manors, lands, tenements, rents, and
" other hereditaments and things above-
" mentioned, by any manner of aſſurance,
" conveyance, will, deviſe, or otherwiſe
" had, made, ſuffered, acknowledged, or
" declared, given, aſſigned, limited, or ap-
" pointed, to the finding of any prieſt, to
" have continuance for ever; and where-
" with, or whereby, any prieſt was ſuſ-
" tained, maintained, or found within five
" years next before the firſt day of this
" preſent parliament, which were not in
" the actual and real poſſeſſion of the ſaid

" late king, nor in the actual and real poſ
" ſeſſion of the king that now is; and alſo
" all annual rents, profits and emoluments,
" at any time within five years next before
" the beginning of this preſent parliament,
" employed, paid, or beſtowed towards or
" for the maintenance, ſupportation, or
" finding of any ſtipendiary prieſt, intend-
" ed by any act or writing to have con-
" tinuance for ever, ſhall by the authority
" of this preſent parliament, immediately
" after the *Feaſt of Eaſter* next coming, be
" adjudged and deemed, and alſo be in
" the very actual and real poſſeſſion and
" ſeiſin of the king our ſovereign lord, and
" his heirs and ſucceſſors for ever, without
" any office or other inquiſition thereof to
" be had or found, and in as large and
" ample manner and form as the prieſts,
" wardens, maſters, miniſters, governors,
" rulers, or other incumbents of them, or
" any of them, at any time within five
" years next before the beginning of this
" preſent parliament, had, occupied, or
" enjoyed, or now hath, occupieth, or en-
" joyeth the ſame; and as though all and
" ſingular the ſaid colleges, free chapels,
" chaunteries, ſtipends, ſalaries of prieſts,
" and the ſaid manors, lands, tenements,
" and hereditaments, and other the pre-
" miſes, whatſoever they be, and every of

" them

" them, were in this act ſpecially, particu-
" larly, and certainly rehearſed, named,
" and expreſſed, by expreſs words, names,
" ſirnames, corporations, titles, and facul-
" ties, and in their natures and qualities.
" And over, that it be enacted, *&c.* that
" were any manors, lands, tenements,
" Tithes, penſions, portions, rents, profits,
" or other hereditaments, by any manner
" of aſſurance, conveyance, will, deviſe, or
" otherwiſe, at any time heretofore had,
" made, knowledged, ſuffered, or declared,
" were given, aſſigned, or appointed, to or
" for the maintenance, ſuſtenation, or find-
" ing of one prieſt, or of divers prieſts,
" for the term of certain years, yet con-
" tinuing; and that any prieſt hath been
" maintained, ſuſtained, or found with the
" ſame, or with the revenues or profits
" thereof, within five years laſt paſt; that
" the king from the ſaid *Feaſt Day of*
" *Eaſter* next coming, ſhall have and enjoy
" in every behalf, for, and during all ſuch
" time to come, all and every ſuch and
" like things, tenements, hereditaments,
" profits, and emoluments, as the prieſt or
" prieſts ought or ſhould have had for or
" towards his or their maintenance, ſuſten-
" ance, or finding, and for no longer time,
" *&c.*"

There is a like clauſe for lands, tenements, or hereditaments, given for anniverſaries, obits, church or chapel lamps, lights, *&c.* and ſeveral other clauſes for the like and other purpoſes, all which are well worthy peruſal, but too long to be here inſerted.

The caſe upon this ſtatute was:—The maſter of a college (the lands whereof came to the king by this ſtatute) held ſome of his lands with a rectory, *ſimul et ſemel*, diſcharged of Tithes at the time of making this ſtatute, and of the *ſtat.* 31 *H.* 8. and after the ſtatute made, the farmer of the rectory ſuing the farmer of the lands for the Tithes thereof, the defendant ſhewed this matter, and alledged the branch of diſcharge in the *ſtat.* 31. *H.* 8.; and it was reſolved, that the college, &c. that came to the king by the *ſtat.* 1. *Ed.* 6. came to him by that ſtatute only, and not by the general words in the *ſtat.* 31 *H.* 8. "all "colleges, *&c.* which hereafter ſhall happen to be diſſolved, or by any other "means come to the king's highneſs, *&c.* "ſhall be adjudged to be in the actual poſſion of the king, *&c.*"

Firſt, Becauſe the words "all other "means" cannot be intended of an act of parliament,

parliament, being after words inferior thereto, as " renouncing, relinquiſhing, forfeiture, *&c.*" An act of parliament being the higheſt manner of conveyance, upon which reaſon it hath been adjudged, that biſhops are not comprehended in the *ſtatute* 13 *El. c.* 10. by the words " others " holding ſpiritual promotions;" theſe words being therein put after " colleges, " deans and chapters, *&c.*

Secondly, Becauſe the ſaid *ſtat.* 1 *Ed.* 6. enacts, that all colleges, *&c.* ſhall be by force of that act adjudged to be in the actual and real poſſeſſion of the king; and therefore (that ſtatute ſo enacting) they cannot be in the king by the former ſtatute.

And it was alſo adjudged, that the branch in 31 *H.* 8. did not extend to any other monaſteries than what came to the king by the *ſtat.* 31 *H.* 8. becauſe what would be given by another ſtatute, or that any thing would be given thereby, could not then be foreſeen.

And that lands which came to the crown by the 1ſt *Ed.* 6. are not diſcharged of Tithes by the words of that ſtatute, " that Moor 240. 2 Co. 46.

the king ſhall have the lands of colleges, &c. "in as large and ample manner as the "ſaid prieſts, wardens, &c. had or enjoyed "the ſame." For that theſe general words ſhall not diſcharge the lands of any Tithes, becauſe they do not iſſue out of the land, but are things diſtinct from the land.

Having fully conſidered the ſeveral ſtatutes relating to the diſcharge of Tithes on the diſſolution or ſuppreſſion of monaſteries, &c. the ſeveral lands, as before propoſed, which are diſcharged from the payment of Tithes for a limited time only, ſuch as barren-lands, heath-lands (when improved) derelict-lands, or lands gained from the ſea, fenny-lands, thorny-lands, &c.

For as, by act of parliament, lands may be perpetually diſcharged from Tithes, as hath been ſhewed; ſo by act of parliament certain lands are free from the payment of
S. 5. Tithes for a time, as by 2 and 3 *Edward* 6. For in that act there is this proviſo:— "Provided always, and be it enacted by "the authority aforeſaid, that all ſuch bar-"ren, heath, or waſte ground, other than "ſuch as be diſcharged for the payment of "Tithes by act of parliament, which be-"fore this time have lain barren, and paid

"no

" no Tithes by reaſon of the ſame bar-
" renneſs, and now be, or hereafter ſhall
" be improved and converted into arable
" ground or meadow, ſhall from hence-
" forth, after the end and term of ſeven
" years, next after ſuch improvement fully
" ended and determined, pay Tithes for
" the corn and hay growing upon the
" ſame, any thing in this act to the con-
" trary thereof in any wiſe notwithſtand-
" ing."

And it is further enacted, " That if any S. 6.
" ſuch barren, waſte, or heath ground hath
" before this time been charged with the
" payment of Tithes, and that the ſame
" be hereafter improved or converted into
" arable ground or meadow, that then the
" owner or owners thereof ſhall, during
" the ſeven years next following from and
" after the improvement, pay ſuch kind of
" Tithe as was paid for the ſame before
" the ſaid improvement; any thing in this
" act contained to the contrary in any wiſe
" notwithſtanding."

The former of theſe clauſes was added for the encouragement of tillage, and improvement of lands by water or otherwiſe; and therefore, though there be no words of diſcharge from the payment of Tithes dur-

ing the firſt ſeven years, yet by reaſonable intendment, the ſame ſhall be diſcharged from the payment of Tithes of corn and hay, for the firſt ſeven years after the improvement.

Dyer 170. 2 Inſt. 656. Deg. p. 2. c. 19.

Sir *Simon Degge*, in his notes on the latter clauſe, ſays, " it appears thereby that the intent of the law-makers was only to free ſuch improved lands from the payment of ſuch Tithes as were produced by ſuch improvement, which muſt be corn and hay, and no other." And cites *Plowden* 204 and 396.

By the 4th ſection of 2 and 3 *Edw.* 6. it is enacted, " that no perſon ſhall be " ſued, or otherwiſe compelled to yield, " give, or pay any manner of Tithes, for " any manors, lands, tenements, or here- " ditaments, which by the laws and ſtatutes " of this realm, or by any privilege or pre- " ſcription, are not chargeable with the " payment of any ſuch Tithes, or that be " diſcharged by any compoſition real."

Sir *Simon Degge* ſeems to doubt where a man having barren lands within the ſtatute, which by cuſtom, preſcription, compoſition real *&c.* are free from the payment of Tithes; whether under the above ſtatute they

they are free from the payment of them; but that doubt ſeems to me fully cleared up by the laſt mentioned clauſe.

And it may from the laſt mentioned act be fairly concluded, (as I conceive) that no barren lands improved, that belonged either to the abbies or monaſteries diſcharged by 31 *H.* 8. *&c.* as aforeſaid, or to any of the king's ancient demeſnes or foreſt lands, *&c.* ſhall at the end of ſeven years after ſuch improvement be charged with the payment of Tithes. Nor ſhall any barren lands improved, belonging to any manor, *&c.* for which manor there is any general preſcription or real compoſition, be liable to pay any Tithes in kind, notwithſtanding ſuch improvement. For this laſt recited clauſe preſerves all legal diſcharges, either by the common law, or by any ſtatute, privilege, or preſcription.

The great queſtion upon this law has been,---What ſhall be ſaid to be barren, heath, or waſte ground within this ſtatute?

Sir *Edward Coke* in 2 *Inſt.* 655. treating of barren lands in general, ſays, "*Terra ſterilis eæ vi termini eſt terra infæcunda, nullum ferens fructum.*"

But

But he further obſerves, " that it is not only ſo ſtrictly taken in this act, but hath alſo a more reſtrained ſenſe. For, albeit, it doth not yield ſome fruit, yet if it be barren land, *quoad agriculturam*, as to tillage, which this branch meant to advance, it is within this act; for, albeit, barren ground (as to tillage) doth pay Tithe-wool and lamb; yet is it within this act? and this appears by the next proviſo in this act for
2 Inſt. 656. the payment of ſuch Tithe as during the ſeven years before the improvement was paid."

But if ground be not apt for tillage, yet if it be not *ſuapte naturæ* barren, it is not within this act. As, if a wood be ſtubbed and grubbed, and made fit for the plough, and employed thereunto, yet ſhall it pay Tithes preſently, for wood-ground is *terra frutilis et fæcunda*.

And yet, by *Richardſon*, if ſuch land be-
Hetl. 147. fore its improvement yielded any profits, as if ſheep were kept thereon; or if it produced any other profit that did yield Tithes, ſuch Tithes ſhall be paid, as hath been formerly paid thereof.

Dyer 170. But if the land be truly barren in its own nature, although it paid before its improvement for tillage, by extraordinary charges,

Tithes

Tithes of wool and lamb, no other Tithes ſhall be paid thereof than Tithes of wool and lamb, as before.

If barren land, by reaſon of ſheep, *&c.* kept thereon, might have yielded ſome Tithes, and yet no Tithes were paid thereof, if it be land capable of a diſcharge from the payment of Tithes, of which this *non*-payment may be an evidence, if ſuch land by charge and induſtry be improved and made fruitful, yet it ſhall not pay any Tithes. For the improvement of the land not Tithable by law cannot make it become Tithable; for this were to alter the law, and to make a conſtruction contrary to the intent of the ſtatute, which was to encourage improvements by freeing ſuch lands for ſeven years from paying Tithes, which elſe were liable; but not to charge any lands with the payment of Tithes, which by law, before the improvement, were Tithe-free. Watſ. c. 48. Stiles Reg. 625.

The ſtatute doth particularly except lands diſcharged from the payment of Tithes by act of parliament, that ſuch lands ſhall not after the ſeven years be liable to pay Tithes by force of this ſtatute, but if land have not paid Tithes within the memory of man, by reaſon of its barrenneſs, occaſioned by accident only, and not from its natural ſterility, Watſ. c. 48.

ſterility, and the owner or occupier, with great charge, makes it fit for tillage, hay, or paſture, yet Tithes ſhall be preſently paid upon the improvement thereof, without reſpect to the favour of this proviſo.

Therefore, if marſh and ſandy-land hath been covered with ſalt-water, ſo that time out of mind no graſs had been known there to grow, nor any profit at all made thereof, until at length, by great charges and induſtry this ground had been lately gained from the ſea, by making coſtly banks and ſea-walls, and continual reparation thereof; yet, this yielding no profit, being barren by accident only, *viz.* through the flowing of the ſea thereon, and not from its natural barrenneſs, ſhall have no benefit by this ſtatute of being diſcharged from Tithes for ſeven years, but ſhall yield a Tithe to the parſon immediately; and though land that hath formerly paid Tithe be after overflown for two, three, or more years, the parſon can have no Tithe for the time, yet if the land be regained, though at great charges and induſtry, Tithes ſhall be paid thereof, as of other lands, according to the profit that it yields. Watſ. c. 48.

In a prohibition between *Sharrington* and *Fleetwood* for Tithes in *Orwell*, in the county of

of *Lancaſter*, it was reſolved, that if marſh-meadows, or other land, for not cleanſing of the trenches or ſewers, or by ſudden accident, or inundation of waters be ſurrounded, or by ill-huſbandry or unprofitable negligence any land become over-run with buſhes, furs, whins, and briars, yet are not they or any of them ſaid to be barren land within this ſtatute, becauſe of their own nature they are fruitful, and the parſon, *&c.* ſhall not by this act be barred of his Tithes by ill huſbandry or negligence of the owner or poſſeſſor. 2 Inſt. 656.

Mr. *Watſon*, as I conceive, has rather exceeded the bounds limited by the authorities by him cited, in ſaying that lands gained from the ſea ſhall pay Tithes, although never before Tithable. For, according to *Stiles Reg.* 625. where it is ſaid, "The improvement of land, not Tithable by law, cannot make it become Tithable; for this were to alter the law, and make a conſtruction contrary to the intent of the ſtatute; which was to encourage improvements, by freeing ſuch lands for ſeven years from the payment of Tithes, which elſe were liable, but not to charge any lands with the payment of Tithes, which by law before were not liable"

And another objection ariſes to this opinion of Mr. *Watſon's*, for as the ſea is within no pariſh, how can the land gained therefrom be ſaid to lie in any pariſh? Or to whom of common right are the Tithes of ſuch lands payable? But I conceive that for lands originally gained from the ſea, (and the more ſo as there are no deciſions contrary to this opinion) no Tithes are due or payable either by common law, cuſtom, or preſcription.

If land has formerly paid Tithes, and the ſame land is afterwards overflown for two or three or twenty years together, though the parſon there can have no Tithes, for the time it is ſo overflown, yet when the land is regained, Tithes ſhall be paid thereof.

3 Bulſt. 65.
1 Roll. Rep. 354.
S. C.

And it has alſo been adjudged that fenny lands drained ſhall pay Tithes, the ſame as other lands, notwithſtanding this ſtatute.

Moor 430. 909.
3 Cro. 475.

In the caſe of *Stockwell*, v. *Terry*. The bill was brought by a rector for payment of Tithes in kind of 300 acres of land. Two bars were ſet up, the firſt general to all acres, the *Statute* 2. *Ed.* 6. 13. by which waſte ground improved into arable or meadow,

dow, ſhall not pay Tithes till ſeven years after the improvement is compleated; as to which the caſe appeared, that the land in queſtion was a common field for ſheep, horſes, and cows, but not fit for fattening them, being over-run with bruſhwood; briars, and other weeds; the parſon was entitled to Tithes of calves, milk, wool, *&c.* out of it, and it was proved to be worth two ſhillings per acre, before it was improved.

For plaintiff, it was argued, that this land was not within this ſtatute; for it muſt be *naturâ ſuâ ſterilis*, and that the ſtatute intends only ſuch lands as were merely barren and made good by induſtry; and if it yielded any profit before, as wood, *&c.* it is not within it. This ground yielded profit before, and cattle were kept on it; which could not be if it was waſte.

For defendant, it was ſaid that this act was made to encourage agriculture, by the not loſing a tenth of the improvement; although the land yields ſome fruit, yet barren *quoad agriculturam*, it is within this ſtatute; which muſt mean ſuch lands as are not fit for agriculture without a conſiderable expence; as a recompence for which this encouragement is given. Defendant has been

been at a great expence, in clearing and improving this ground, and will not have the benefit of it, if to pay Tithes the firſt ſeven years.

By the Lord Chancellor. "If there had been a ſuit in the eccleſiaſtical court; and defendant pleaded the ſtatute as here; and the plaintiff denied that this was within it, there muſt by the nature of their juriſdiction have been a prohibition. In this caſe a ſound diſcretion ſhould be uſed, for by too ſtrict a conſtruction, the party might bring a burthen upon the party improving, which would alſo tend to impoveriſh the church; for by theſe improvements, livings are made better: and though the preſent incumbent were not capable of Tithes for ſeven years, yet after that the profit will be increaſed. On the other hand it will greatly prejudice the incumbent, to call land to ſome degree fertile, barren land; for he will thereby be deprived of his Tithes. I muſt be guided by the deciſions made on the act, all which have been agreeable to Lord *Coke's Comment* 2 *Inſt.* 655. where the rule laid down is; if land in its own nature ſo barren as not to be proper for agriculture after it is improved, it ſhall not pay Tithe, but if in its own nature it be fit for tillage, but by reaſon of wood or other accidental circumſtance, it

was

was not turned into tillage before; upon the taking away that accidental circumſtance, it ſhall pay Tithes preſently on being turned to tillage; for the act does not conſider the expence, but that you may by poſſibility be paid by the timber, under wood, *&c.*

But if afterward this land will not produce unleſs dunged or chalked, the court has conſidered this as evidence of its being barren in its own nature, not proper for corn without additional improvement. It is admitted that this land produced three crops of corn, without any thing but ploughing; but objected that chalking will be neceſſary; and ſo it may in the courſe of common huſbandry. But the queſtion is, what was neceſſary for the firſt crop? The way of arguing for defendants would throw the expence upon the firſt ſeven years; whereas the benefit is to continue for ever. It is admitted that this land is not barren; and there is much land that can neither be called fruitful or barren, that pays Tithe.

Ordered that an account be taken of the ſeveral Tithes to be paid, and the plaintiff to have his coſts. 1 Vez. 116.

In the above caſe, the following deciſions *&c.* were cited on the part of the plaintiff, *viz.* 2 *Inſt.* 656. *Cro. El.* 475. 1 *Roll. Rep.* 354. 2 *Bulſt.* 163. 6 *Mod.* 96.

3 Cro. 475. Moor 909.

If lands have been full of thorns and buſhes *&c.* time out of mind, and by grubbing, *&c.* are made arable or meadow, Tithes ſhall preſently be paid thereof, notwithſtanding this *ſtatute*; for ſuch lands are not barren of their own nature, but became ſo by negligence and ill huſbandry.

Deg. p. 2. c. 19.

If lands were barren, heath, or waſte ground, at the time of the making of the act, and were afterwards improved, and had or might have had, the benefit of this law, and afterward return to their barrenneſs, the owner of ſuch lands ſhall not have the benefit of this law upon a ſecond improvement: but the law ſeems to be otherwiſe; if the lands had been improved before the time of making this law, and were then become barren again, for theſe I take it upon a new improvement, the owners of ſuch lands ſhall have the benefit of this law.

1 Keb. 253. Deg. p. 2. c. 19.

The determination of this point, which is or is not barren land within this *ſtatute*, is to be tried by a jury at common law, and not to be determined in the ſpiritual court.

Therefore

Therefore in a ſuit for Tithes in the ſpiritual court, if the defendant pleads his barren land, and that plea be refuſed, or iſſue be taken upon it, there a prohibition ſhall be granted, but a prohibition ſhall not be granted upon ſuggeſtion only that 'tis barren land, before it be pleaded in the ſpiritual court. 1 Keb. 387.

In the caſe of *Strowd* v. *Hopkins*, two points were argued, and agreed by four judges in king's bench, *viz.* when a prohibition is brought on the ſaid *ſtatute*, *Edward* 6. to ſtay a ſuit in the ſpiritual court for Tithes of barren lands, for the firſt ſeven years; the party ought to prove his ſuggeſtion within ſix months, or a conſultation ſhall go: and when a conſultation is granted for that cauſe, yet the party may have a new prohibition upon the ſame libel; for that the *ſtatute* 50 *Edw.* 3. doth not extend to a conſultation granted upon the *non probate* of a ſuggeſtion within ſix months; but where it is granted upon the matter of the ſuggeſtion only. Rep. Canon. 387. 1 Jon.

The caſe of *Moncaſter* v. *Watſon* as was reſerved from the northern circuit, in an action brought on 2 and 3 *Ed.* 6. *c.* 13. by a lay impropriator againſt the occupiers of lands in the pariſh of *Felton* in the county of *Northumberland*, for taking away their corn and hay without ſetting out the Tithe or 3 Burr. 1375. 1 Black Rep. 402. S. C.

agreeing for it. The ſubſtance of the caſe ſtated was, that they claimed to be exempt from paying any Tithe at all for theſe lands, upon the following foundation, viz.

That a private act of parliament was paſſed in the year 1753, (26 G. 2. *c.* 46) for dividing and incloſing the common, called *Felton* common in the pariſh of *Felton*, in the county of *Northumberland*. That the lands in queſtion till the ſaid year 1753, (when the ſaid common was ſo divided and incloſed) had been part of the ſaid common, whereupon the commoners had uſed to have common for their cattle *levant* and *couchant*, *&c.* That 90 acres, part of the ſaid common, were by the ſaid act of parliament allotted to the owner of *ſwardland demeſne*: under which ſaid allottment, the defendants occupy the ſaid 90 acres, formerly part of the common, but now made parcel of *Swardland demeſne*.

That the act directs that the divided lands (before parcel of the common) ſhall be holden by each perſon to whom the reſpective diviſions are allotted, ſubject to the ſame charges and incumbrances as their own former lands, to which they are allotted and conſolidated, were before ſubject; and it is declared in the act itſelf, "That it be conſtrued beneficially to the ſaid land owners

to

to whom the reſpective diviſions are allotted," That the owners of *Swardland demeſne* had never paid Tithe of corn, grain, or hay; having been always exempt from the payment of Tithes of corn and grain, in conſideration of having always kept in repair the north end of *Felton* church; and being exempt by a *modus* from the payment of Tithe of hay.

The queſtion ſtated upon the caſe, (and the only queſtion then intended to be brought before this court) was, whether the occupier of theſe 90 acres, late parcel of the common, but now allotted to the owner of *Swardland demeſne*, are or are not liable to the payment of Tithe of corn and hay.

Mr. *Wallace* who argued for the defendants, contended that as the allottment was to bear all the burthens of the ancient eſtate to which it was now annexed, it ought therefore to enjoy all the privileges of it: and as this ancient eſtate was exempt from Tithes, ſo alſo ought the allottment in thoſe acres to be. And he relied very much upon a caſe in the court of chancery, determined by Lord *Hardwicke*, on 15 *July* 1748, which he cited as in point, the name of it was *Stockwell* v. *Terry*. *Stockwell* was rector of the pariſh and filed his bill againſt the occupier of ſome 1 Vez. 115.

land then ploughed up, for Tithe of the corn which grew upon it. The defendant inſiſted upon a *modus* of 15s in lieu of all Tithes ariſing upon the grange farm; and that the grange farm had never paid any Tithes. Then he ſhewed, that the land, for which *Stockwell* demanded this Tithe of corn by his bill, had been part of a down which had been incloſed by a private act of parliament, and had been thereby allotted to and had ever ſince continued part of the grange farm; and therefore ought to be exempt from all Tithes as well as the grange farm itſelf. And Lord *Hardwicke* diſmiſſed this rector's bill, as far as it related to this land which had been down land, and was ſo allotted to grange farm.

Mr. *Thurlow* for the plaintiff, argued, that notwithſtanding this decree in *Stockwell's* caſe, yet in the preſent caſe which differs much from that the allotted common, is not exempted from the payment of Tithes. This demand of the impropriator, in the preſent caſe, is a claim of the Tithe of corn, grain, and hay; but corn, grain, and hay, could not be part of what grew on a common, the Tithes that aroſe upon this common (appendant to *Swardland demeſne*) could have been only Tithes of agiſtment or of lambs, calves, wool, milk and other things that could be the produce of a com-

mon

mon. Tithes are not iſſuing out of the land but collateral to it; and they cannot be diſcharged but by ſpecial words; which this act does not make uſe of, the words of it being only general words. Now a *modus* or other compenſation muſt be in lieu of theſe ſpecific Tithes. This exemption therefore cannot relate to any other Tithes but ſuch as could in their nature have ariſen out of the common. An exemption may be eaſily deſtroyed. An alteration of the uſe of the lands will deſtroy it. Here the exemption claimed, is to be diſcharged of the Tithes of corn, grain, and hay, ariſing and growing on *Swardland demeſne*. But the common now incloſed and allotted, was not, whilſt it was common, capable of producing either corn, grain, or hay; therefore it is not exempt from Tithe of corn, grain, and hay.

By Lord *Mansfield*, chief juſtice, the caſe of *Stockwell* v. *Terry*, differed very much from the preſent caſe. The *modus* inſiſted upon in that caſe, extended to all kind of Tithes: Whereas the exemption inſiſted upon in the preſent caſe, is confined to the ſpecifie lands called *Swardland demeſne*, and does not extend to the right of common. There is no equivalent at all for the Tithes of agiſtment, of wool, of milk, lambs, or any other

Tithes of ſuch a kind as could ariſe upon a common. The equivalent only goes to corn, grain, and hay; the Tithe whereof could not ariſe upon the common, whilſt a common.

In the caſe cited (*Stockwell* v. *Terry*) the rector was, as owner of the glebe, a party to the act of parliament. And there the *modus* covered the right of common: it was a *modus* of 15s. which was paid for the grange farm, in lieu of all Tithes ariſing upon it, and of all the Tithes of all the cows and ſheep belonging to that farm that ſhould be depaſtured on the ſaid down (which was afterwards incloſed and allotted to it) ſo that the *modus* covered not only the grange farm itſelf with its appurts, but the common alſo (which is not the preſent caſe). Lord *Hardwicke* decreed, that *modus* ſhould ſtand for the allotted lands, as well as for the grange farm and for its appurtenances; and accordingly he diſmiſſed the bill as to thoſe lands which the *modus* covered: but as to all the other lands of the common which had before uſed to pay Tithe of wool, agiſtment, and other ſmall Tithes, he decreed an account. Here all rights are ſaved generally by this act of 26 *G.* 2. conſequently the impropriator's right to Tithes remains: and there is no need to ſhew how they

they are due, for they are due of common right.

The whole were very clear, that in the preſent caſe, the exemption and *modus* did not extend to the waſte and common; and therefore that the allotted lands, which had been part of that waſte and common, having been ſubject to Tithes before the allotment, muſt remain liable to them after it. Which they held to differ materially from the cited caſe, where the *modus* did extend to the waſte and common. They underſtood the words; "ſubject to the ſame charges and incumbrances as their former lands were ſubject to;" to mean only in incumbrances upon the eſtates (as *Dower*, *&c.*) and not to intend its being ſubject to the repairs of the church of *Felton*. And Lord *Mansfield* ſaid, that the caſe of *Lambert* v. *Cumming*, was determined upon the ſame ground as Lord *Hardwicke's* decree went upon (in the caſe of *Stockwell* v. *Terry*) *viz.* That what was before exempted ſhall remain exempted; and what was not before exempted ſhall pay Tithe. And the court unanimouſly ordered the *poſtea* to be delivered to the plaintiff. Bunb. 138.

Note

Note in this caſe the following authorities *&c.* were cited. For the plaintiff, *Cro. El.* 161. 11. *Co.* 13. *b.* 1 *Leon.* 300. *Owen* 39. *Hutton* 58. 1 *Ro. Abr.* 652. *tit diſmes. E. F. pl.* 5. For the defendant, 1 *Vez.* 115. By the court. *Bunb.* 138.

CHAP. IX.

TITHES HOW TO BE RECOVERED, &c.

In what Courts Tithes are to be Recovered, and in what Manner ſuch Suits are to be Proſecuted and Defended in ſuch Courts, where Prohibition lies; the Nature thereof, and in what Caſes Coſts are allowed to Plaintiff or Defendant; within what time Suggeſtion muſt be proved, &c. *with the ſeveral Statutes relating thereto,* &c.

HAVING in the preceding chapters ſhewn the nature, kinds, qualities, and incidents of Tithes; to whom they are due, and by whom payable, with the manner of payment, what lands are liable thereto, and what diſcharged therefrom, with the reaſon and means of ſuch diſcharges, both at the common and ſtatute law.

It ought therefore in the next place to be ſhewn in what courts Tithes may or ought to be recovered, and how and in what

what manner ſuch ſuits are to be proſecuted and defended reſpectively in the ſaid courts.

It is generally ſaid, that the eccleſiaſtical courts have the proper juriſdiction of Tithes, yet that muſt be underſtood to relate only to thoſe times, when, in conſequence of King *John*'s aliening his kingdom to the pope, the eccleſiaſtical courts (which were originally of the pope's erection) claimed the ſole cognizance of thoſe cauſes.

Seld. 412. Lamb's Sax. laws, 45.

For it is very evident from many ancient records and hiſtories of this kingdom, that Tithes and other eccleſiaſtical dues were originally conuſable in the king's temporal courts, and that at common law, and of common right, whoever had any right, property, or intereſt in Tithes, might ſue for the ſame in thoſe courts.

In 2 *Inſt.* 490, it is ſaid, and true it is, that of ancient time the parſons did ſue for ſubtraction of Tithes in court chriſtian, but if the right of Tithes had come in queſtion, it ſhould have been tried by the common law: and therefore, in *libro rubeo inter leges, Hen.* 1. ſpeaking of purſuit of Tithes in court chriſtian, it is ſaid, *ſi rex patiatur.*

And

And, indeed, Sir *Edward Coke* ſays, that in ancient times Tithes were determinable in the ſheriff's turn, and cites *Lib. rub. int. leges, Hen.* 1.

And in *Leges, H.* 1. *cap.* 11. it is ſaid, "*Si quis rectam decimam ſuperteneat vadat præpoſitus regis, & Epiſcopi & Terræ domini cum preſbytero & ingratis, auferant & eccleſiæ reddant, &c.*" *i. e.* if any man withholds or detains Tithes that are due, let the ſheriff or officer, the biſhop's deputy, or archdeacon, and the lord's ſteward or bailiff, together with the preſbyter or parſon of the ſame go and take them away; *i. e.* adjudge them from the detainer, and reſtore them to the church, *&c.*

And that in ancient times, *viz.* before and about the reign of king *H.* 2. the king's ſecular courts originally held plea of the right of Tithes, is rendered ſtill more clear and evident from the many proofs which the reader may find collected by Mr. *Selden* in his 14th chapter of his *Hiſtory of Tithes*, and which will amply repay him for the trouble of ſuch a reference; but as the deſign of this work is to ſhew the law of Tithes at this day, it might (were they here inſerted) be thought (and with propriety) to be digreſſing from the original ſubject.

In

In the *ſtat.* 18 *Edw.* 3. *c.* 7. it is recited and enacted as follows, *viz.* "Whereas "writs of *ſcire facias* have been granted "to warn prelates, religious and other "clerks, to anſwer diſmes in our chancery, "and to ſhew if they have any thing, or "can any thing ſay, wherefore ſuch diſmes "ought not to be reſtored to the ſaid de-"mandants, and to anſwer as well to us "as to the party ſuch diſmes; ſuch writs "from henceforth ſhall not be granted, "and the proceſs hanging upon ſuch writs "ſhall be annulled and repealed, and the "parties diſmiſſed from the ſecular judges "of ſuch manner of pleas; ſaving to us "our right, ſuch as we and our anceſtors "have had, and were wont to have of rea-"ſon. In witneſs whereof, at the requeſt "of the ſaid prelates, to theſe preſent let-"ters we have ſet our ſeal. Dated at *Lon-"don*, the 8th day of *July*, in the year of "our reign of *England* the 18th, and of "*France* the 5th."

Where writs of *ſcire facias* have been granted, *&c.* this rehearſhal, according to
2 Inſt. 640. Sir *Edward Coke*, is true; for (he ſays) we have found that upon divers matters of record, that is to ſay, enrolled, returned, or removed into the chancery: firſt, upon Tithes granted by the king's letters patento, which

which are enrolled in the chancery, writs of *ſcire facias* were brought in that court, as taking one example for many. In 17 *Edward* 3. a *ſcire facias* was brought by the king and the dean and canons of the king's free-chapel of *St. Martin's, London*, upon letters patento of *Mawd, quondam reginæ Angliæ*, of Tithes, *&c.* againſt the Abbot of *St. John's* of *Colcheſter*, who took the ſame after ſeverance, whereunto the abbot pleaded, *&c.*

To warn prelates, religious and other clerks, note this *ſcire facias* was not brought againſt the poſſeſſors of the land for ſubtraction of Tithes, but againſt the prelates or other clerks, which took the Tithes after they were ſevered. See 6 *Edw.* 1. *in bundillo petitionum in tueri, Londos*, where the petition was for ſubtraction of Tithes to be put in poſſeſſion. The anſwer was in parliament (6 *Edw.* 1.) " *Rex non intromirt ſe de hiis quæ taliter ſpectant ad forum eccleſiaſticum, proſequatur jus ſuum verſus clericum coram ordinario.* Ibid. Bract. 5. 403

Commiſſions out of the chancery were directed to certain perſons, giving them authority to enquire whether ſuch a ſpiritual perſon ought to have Tithes of ſuch lands; whereupon inquiſitions were taken and

and returned; and if it were found for the ſpiritual perſon, upon this record he might have a *ſcire facias* againſt any prelate, religious, or other clerk that took them after ſeverance.

2 Inſt. 641. (Saving to us our right) By force of this ſaving, not only the king himſelf, but the provoſt of *C.* being the king's patentee of Tithes of the new aſſarts of the foreſt of *Rockingham*, in the county of *Northampton*, brought a *ſcire facias* in the chancery after this ſtatute, againſt certain perſons of holy church, who had taken the Tithes granted to him, to have execution of the ſaid Tithes according to the king's letters patents. The defendants pleaded to the juriſdiction of the court, that the conuſance of this cauſe for Tithes appertained to court chriſtian, and not to the chancery; whereupon it was anſwered by the court, that that was to be underſtood, where the ſuit was taken againſt them that ought to pay the Tithes, that is to ſay, for ſubtraction of Tithes, and not when it was brought againſt them that were wrongful takers of the Tithes. And all this is well warranted by the book, whereupon the defendants pleaded to iſſue, and the record was delivered over to be tried in the king's bench.

And

And it appears, that wherever the right of Tithes was in queſtion between two laymen, or between a clergyman and a layman, there the king's temporal courts had conuſance thereof.

38 Ed. 3. 36.
39 Ed. 3. 23.
44 Ed. 3. 29.
2 H. 4. 15.
1 H. 6.
5 H. 6. 10.
20 H. 6. 17.
31 H. 6. 11.
2 Ed. 4. 5.
44 Aſſ. 25. &c.

And ſo, if the queſtion was between the farmer or ſervant of one clergyman, and the farmer or ſervant, *&c.* of another, *&c.* or the other clergyman himſelf; there, though the diſpute in theſe caſes appears to be concerning the right of Tithes between the two parſons, yet the king's temporal courts ſhall not be ouſted of their juriſdiction; foraſmuch as it appears both parties are not clergymen.

But where the conteſt was directly between two clergymen, there the juriſdiction ſeems to be as conſtantly admitted.

So that if one parſon ſhould bring an action of treſpaſs at the common law againſt another parſon, for the taking or carrying away of corn or other thing ſet out for Tithes, the defendant may, by way of plea, ſhew that the goods in queſtion were Tithes ſet forth, and ſevered from the nine parts, and that he is parſon of *Dale*, and that he and all his predeceſſors, time out of mind, have had thoſe Tithes as a portion which

belonged to his church; and that the plaintiff being rector of the pariſh where they grew, claims them as his Tithes, and demands judgment, whether the king's court will hold plea, by ſuch plea, 'tis ſaid, the king's court ſhall be ouſted of juriſdiction.

But if the diſpute in ſuch action fall to be about the boundaries of the two pariſhes; or if it happens in pleading or otherwiſe, that ſuch bounds, *&c.* are drawn in queſtion, that the king's court ſhall not be ouſted of it's juriſdiction.

2 Inſt. 461. And Sir *Edward Coke* ſays, and at this day, albeit in caſe of Tithes, the parties by pleading admit the juriſdiction of the court, yet if it be between ſpiritual perſons, and the right of Tithes come to be tried, albeit, it be after the Tithes ſevered, the court *ex officio*, ſhall ouſt the court of juriſdiction, which we hold, where the right of patronage was not drawn in queſtion.

If a queſtion ariſes between the parſon, who is patron, and the vicar, whether the Tithes belong to the one or the other of them, there no prohibition lies, if both claim by the ſame title.

Noy 147. Moor 907.

In

In *F. N. B.* 37. *E.* It is ſaid that where the right of Tithes is controverted between two clergymen, who come into their churches, by ſeveral patrons, there the ſpiritual court hath no juriſdiction to determine the right, in caſe the Tithes amount to the fourth part of the yearly value of the church. But in ſuch caſe the title is to be determined in the king's courts by a writ of right of advowſon of Tithes. Yet in that caſe, if the Tithes in queſtion do not amount to the fourth part of the yearly value of the church, the eccleſiaſtical court may determine the right on a writ of ſpoliation.

But it ſhould ſeem, that if they claim both by one patron, there though the whole Tithes come in this debate, the title ſhall be determined in the ſpiritual court by a ſuit in the nature of a ſpoliation. Deg. 371.

It appears in our books, that the writ of *indicavit* (or prohibition at common law) according to the opinion of very learned judges, lay in all caſes where the right of patronage might come in diſpute. 4 Ed. 4. 27. b per Markham. 38 H. 6. 29. per Moyll. Bract. lib. 5. c. 4. 402. b.

The writ of *indicavit* muſt be brought to the patron before ſentence is given in court chriſtian. This writ of *indicavit* is againſt 2 Inſt 364.

the canonical ſanction, and yet hath been ever obeyed; for all foreign ſanctions or canons againſt the law or cuſtom of this realm, are of no force and bind not here.

If an abbot be parſon, imparſonee of the church of D. and another abbot is parſon imparſonee of the church of E. ſo as there be (in reſpect of the appropriations) but two
F. N.B. 45 d. parſons, yet for that each party is both patron and incumbent, an *indicavit* lieth between them.

But whatever the common law was, it is now ſettled by the ſtatutes of *circumſpecte agatis* and *articuli cleri*, *c.* 2. that unleſs the Tithes in demand, be at leaſt of the fourth part of the value of the church, this writ of *indicavit* will not lie.

The words of *articuli cleri*, *c.* 2. are "*Si* "*ſit contentio de jure decimarum originem ha-* "*bens de jure patronatus, et earundem deci-* "*marum quantitas aſcendat ad quartam partem* "*bonorum eccleſiæ locum habeat regia prohi-* "*bitio,*" *i. e.* "If debate ariſes upon the "right of Tithes having the original from "the right of the patronage, and the quan- "tity of the ſame Tithes do come unto the "fourth part of the goods of the church,

"the

"the king's prohibition ſhall hold place," that is to ſay, this writ of *indicavit*.

This writ lies where one parſon demands Tithes againſt another parſon, to the fourth part of the value of the church, or more, *i. e.* where they come into the church, or claim their rights under ſeveral patrons. For if they come in both by one patron, then the right of advowſon cannot come in queſtion; and by conſequence this writ will not lie.

And although the law at this day be reſtrained to a fourth part of the value of the church, where before it extended to a ſixth, *&c.* yet the ancient form of the writ ſtill remains. And is not altered by either of the ſaid *ſtatutes*. And therefore if the Tithes in demand be under a fourth part of the value of the church, it muſt be ſhewn in pleading by the other ſide. 2 Inſt. 364.

And this writ lies as well for offerings as for Tithes. And there is a note in the regiſter, that it lies of a vicarage or prebend, *et alia ſimilia*, as well as a rectory, and ſee the form of writ, *F. N. B.* 30, *c. Reg.* 33 36. *&c.*

But this writ of *Indicavit* as well as other real actions, are now grown almoſt obſolete, and are ſeldom put in practice, and therefore it is needleſs to further enlarge on the nature thereof: but proceed to ſhew; Thoſe *ſtatutes* which have given juriſdiction to the eccleſiaſtical courts in caſes of Tithes, *&c.* and as to this it may be obſerved;

That although eccleſiaſtical courts for ſome time after the conqueſt, (as aforeſaid) ſometimes held plea in caſes of ſubſtraction or withholding of Tithes, yet, the firſt *ſtatute* which granted or confirmed to them that juriſdiction, was the before-mentioned *ſtatute* of *circumſpecte agatis*, made 13 *Ed.* 1. whereby it is enacted. " *Item ſi rector petat* " *verſus parochianos oblationes et decimas debi-* " *tas vel conſuetas, vel ſi rector agat contra* " *rectorem de decimis majoribus, vel minoribus,* " *dummodo non petatur quarta pars valoris* " *eccleſiæ. Item ſi rector petat mortuarium* " *in partibus ubi mortuarium, dari conſuevit.* " *Item, ſi prælatus alicujus eccleſiæ, vel advo-* " *catus petat a rectore penſionem ſibi debitam,* " *omnes hujuſmodi petitiones ſunt faciend' in* " *foro eccleſiaſtico. In omnibus prædictis caſi-* " *bus, habet judex eccleſiaſticus cognoſcere regia* " *prohibitione non obſtante.*" *i. e.* " That if " any rector demands againſt his pariſhioner " oblations

" oblations and Tithes, due or ac-
" cuſtomed, or if one rector demands
" againſt another rector, any Tithes great
" or ſmall, ſo that it be not the fourth part
" of the value of the church. Alſo if a
" rector demands a mortuary in ſuch place
" where a mortuary is accuſtomed to be
" given. Or if any prelate of any church
" or patron of an advowſon, demands of the
" rector any penſion due to him, all theſe
" demands are to be made in the eccleſiaſti-
" cal court: In all the above mentioned
" caſes, the ſpiritual judge ſhall have pow-
" er to take knowledge, notwithſtanding
" the king's prohibition."

There has been formerly ſome doubt, whether this be an act of parliament. But Sir *Edward Coke*, Mr. *Selden* and others, do think it a good *ſtatute*. 2 Inſt. 487. Seld 424.

It has likewiſe been doubted, admitting it to be a good act of parliament, whether it extended further than the dioceſe of *Norwich*, but Sir *Edward Coke* ſays, the biſhop of *Norwich* is here put but for example, but it extendeth to all the biſhops within this realm.

The ſecond *ſtatute* made concerning the juriſdiction of the eccleſiaſtical courts in 9 Ed. 2. c. 1.

caſes of Tithes, was the *ſtatute* commonly called *articuli cleri*, the articles thereof being projected and drawn up by the clergy. It is as follows. "Whereas laymen do purchaſe prohibitions generally, upon "Tithes, obventions, oblations, mortuaries, redemptions of penance, violent laying hands on clerks, or converts and in caſes of defamation, in which caſes ſpiritual penance ought to be enjoined. The king doth anſwer, that in Tithes, oblations, obventions, mortuaries), when they are propoſed under theſe names) the king's prohibition ſhall hold no place, although for the long withholding the ſame, the money may be eſteemed at a ſum certain. But if a clerk or a religious man do ſell his Tithes being gathered in his barn, or elſewhere to any man for money, if the money be demanded before a ſpiritual judge, the king's prohibition ſhall lie, for by the ſale the ſpiritual goods are made temporal, and the Tithes turned into chattels." The remaining part of this *ſtatute* relates only to Tithes of new mills, which ſee under chapter 4. *ante*.

After this came the *ſtatute* 18 *Ed.* 3. *c.* 7. which is before recited in this chapter.

The next *ſtatute* that occurs reſpecting theſe matters, is that of 1 *R.* 2. *c.* 13. which

is

is as follows. "The prelates and clergy of "this realm, do greatly complain them, "for that the people of holy church, pur- "ſuing in the ſpiritual court for their "Tithes and their other things which of "right ought, and of old time were wont "to pertain to the ſame ſpiritual court; "and that the judges of holy church, hav- "ing cognizance in ſuch cauſes, and other "perſons thereof meddling according to the "law, be maliciouſly and unduly for this "cauſe indicted, impriſoned, and by ſe- "cular power horribly oppreſſed, and alſo "inforced with violence by oaths and "grievances obligations and many other "means unduly compelled to deſiſt and "ceaſe utterly of the things aforeſaid, "againſt the liberties and franchiſes of holy "church: Wherefore it is aſſented, that "all ſuch obligations made or to be made, "by dureſs or violence ſhall be of no va- "lue. And as to thoſe that by malice do "procure ſuch indictments, and to be the "ſame indicted, after the ſame *indictees* be "acquit; ſuch procurers ſhall ſuffer a year "impriſonment, and reſtore to the parties "their damages, and ſhall nevertheleſs "make a grievous fine unto the king. "And the juſtices of Aſſiſe, or other juſ- "tices, before whom ſuch *indictees* ſhall be "acquit, ſhall have power to inquire of

"ſuch

" ſuch procurers and indictors, and duly " puniſh them according to their deſert."

By chapter 14. of the ſame parliament, " It is accorded, that at what time that " any perſon of the holy church be drawn " in plea, in the ſecular court, for his own " Tithes taken by the name of goods taken " away, and he which is ſo drawn in plea, " maketh an exception, or alledgeth, that " the ſubſtance and ſuit of the buſineſs is " only upon Tithes due of right and of poſ- " ſeſſion to his church, or other his bene- " fice : in ſuch caſe the general averment " ſhall not be taken, without ſhewing ſpe- " cially how the ſame was his lay chat- " tel."

Note, both the laſt mentioned acts are now obſolete.

Vide ante.

After which, we have no *ſtatute* about Tithes, offerings, or other church revenues, till the *ſtat.* made 21 *H.* 8. *c.* 6. about mortuaries.

The next *ſtatute* is 27 *H.* 8. *c.* 20. when by the noiſe of the diſſolution of monaſteries in this parliament, laymen took occaſion upon trifling pretences, to withdraw their Tithes; it was enacted as follows : " For

" as

" as much, as divers numbers of evil diſ-
" poſed perſons, inhabiting in ſundry coun-
" ties, cities, towns, and places of this
" realm, having no reſpect to their duties
" to Almighty God, but againſt right and
" good conſcience, having attempted to
" ſubſtract and withhold in ſome places the
" whole, and in ſome places great part of
" their Tithes and oblations, as well per-
" ſonal as predial, due unto God and holy
" church, and purſuing ſuch their deteſta-
" ble enormities and injuries have attempt-
" ed in late times paſt, to diſobey, contemn,
" and deſpiſe the proceſs, laws, and de-
" crees of the eccleſiaſtical courts of this
" realm, in more temerous and large man-
" ner than before this time hath been ſeen;
" for reformation of which ſaid injuries,
" and for unity and peace to be preſerved
" amongſt the king's ſubjects of this realm;
" our ſovereign lord the king, ſupreme
" head on earth, under God of the church
" of *England*, willing the ſpiritual rights
" and duties of that church to be preſerved
" continued and maintained; hath ordained
" and enacted by authority of this preſent
" parliament, that every of his ſubjects of
" this realm, *England*, *Ireland*, *Wales*, and
" *Calais*, and marches of the ſame, ſhall,
" according to the eccleſiaſtical laws and
" ordinances of this church of *England*, and

" after

" after the laudable uſes and cuſtoms of
" their pariſh, or other place where he
" dwelleth or occupieth, yield and pay his
" Tithes and offerings or other duties of
" holy church; and that for ſuch ſubſtrac-
" tions of any of the ſaid Tithes, offer-
" ings or other duties, the parſon, vicar,
" curate, or other party in that behalf ag-
" grieved, may by due proceſs of the
" king's eccleſiaſtical laws of the church of
" *England*, convent, the perſon or perſons
" offending before his ordinary, or other
" competent judge of this realm, having
" authority to hear and determine the right
" of Tithes, and alſo to compel the ſame
" perſon or perſons offending to do and
" yield, their ſaid duties in that behalf; and
" in caſe the ordinary of the dioceſe or his
" commiſſary or the archdeacon, or his offi-
" cial, or any other competent judge afore-
" ſaid, for any contempt, contumacy, diſo-
" bedience, or other miſdemeanor of the
" party defendant, make information, and
" requeſt to any of the king's moſt honour-
" able council, or to the juſtices of peace of
" the ſhire, where ſuch offender dwelleth,
" to aſſiſt and aid the ſame ordinary, com-
" miſſary, archdeacon, official, or judge,
" to order or reform any ſuch perſon in any
" caſe before rehearſed; that then he of
" the king's ſaid honourable council, or

" ſuch

" ſuch two juſtices of the peace, whereof
" one to be of the quorum, to whom ſuch
" information or requeſt ſhall be made,
" ſhall have full power and authority, by
" virtue of this act, to attach, or cauſe to
" be attached, the perſon or perſons,
" againſt whom ſuch information or re-
" queſt ſhall be made, and to commit the
" ſame perſon or perſons to ward, there to
" remain without bail or mainprize, till
" that he, or they ſhall have found ſuffici-
" ent ſurety to be bound by recognizance,
" or otherwiſe, before the king's ſaid coun-
" ſellor, or juſtice of peace, or any other
" like counſellor, or juſtice of peace, to
" the uſe of our ſaid ſovereign lord the
" king, to give due obedience to the pro-
" ceſs, proceedings, decrees, and ſenten-
" ces, of the eccleſiaſtical court of this
" realm, wherein ſuch ſuit or matter for
" the premiſes ſhall depend or be; and,
" that every of the king's ſaid counſellors
" or two juſtices of the peace, whereof one
" to be of the quorum, as is aforeſaid,
" ſhall have full power and authority, by
" virtue of this act, to take, receive, and
" record, recognizances and obligations in
" any of the cauſes above written.

" Provided that this act nor any thing S. 2.
" therein ſhall not extend to any inhabi-
" nants

" tants of the city of *London*, for or con-
" cerning any manner of Tithes, offering,
" or other eccleſiaſtical duty, grown and
" due to be paid or yielded within the ſame
" city, becauſe there is another order made
" for the payment of Tithes, and other
" duties within the ſaid city."

S. 3 " Provided alſo, that every perſon and
" and perſons, being party or parties, to
" any ſuch ſuit, ſhall, and may make, and
" have, his and their lawful action, de-
" mand or proſecution, appeals, prohibi-
" bitions, and all other their lawful de-
" fences and remedies, in every ſuch ſuit,
" according to the ſaid eccleſiaſtical laws,
" and *ſtatutes* of this realm, in as ample and
" liberal manner, and form, as they, or
" any of them, might have had, if this act
" had never been made, any thing in this
" act above written notwithſtanding."

S. 4. " Provided alſo, *&c.* that this act for
" recovering of Tithes, nor any thing
" therein contained, ſhall take force and
" effect, but only until ſuch time, as the
" king's highneſs, and ſuch other two per-
" ſons which his highneſs ſhall name and
" appoint for the making and eſtabliſhing

of

" of ſuch laws as his highneſs ſhall affirm " and ratify to be called, the eccle- " ſiaſtical laws of the church of England; " and after the ſaid laws ſo ratified and " affirmed as aforeſaid, that then the ſaid " Tithes are to be paid to every eccle- " ſiaſtical perſon, according to ſuch laws, " and not otherwiſe."

But note, although ſuch a body of laws were drawn up accordingly, and are publiſhed under the title of " *Reformatio legum eccleſiaſticarum, &c.*" yet for that they were not affirmed or ratified by the king, as this act directs, they were never received as laws, and conſequently the ſaid act of 27 *H.* 8. continues ſtill in force. And it is likewiſe confirmed by the *ſtat.* 1 and 2 *Edw.* 6. *c.* 13. *Vide poſt.*

And it is to be obſerved, that this law extends to all ſorts of Tithes, mixt and perſonal as well as predial.

Next, he that will have the benefit of this law, muſt ſue for the ſingle value, and not for the double value upon the ſtatute of 2 *Edw.* 6.

That the plaintiff in the eccleſiaſtical court may proceed upon this act for contempt

tempt, contumacy, or miſdemeanor, as well before as after ſentence.

That the ſecurity upon this act may as well be by bond as by recognizance.

Laſtly, obſerve the wary penning of this act, they muſt pay their Tithes and other church duties according to the eccleſiaſtical laws and laudable cuſtoms and uſages of the place; next, if it be demanded before whom ſuit upon this ſtatute ſhall be made, it is anſwered by the ſtatute itſelf, it muſt be before ſuch judge as hath juriſdiction of the cauſe, ſo that it creates or enlarges no juriſdiction.

1 Lord Raymond 323. 12 Mod. 165. Holt 657. S. C.

The caſe of *Rex* v. *Sanchee* was decided upon this act; and was as follows:— *Sanchee* and others *(Quakers)* were cited into the eccleſiaſtical court, to anſwer there upon their ſolemn affirmation, *&c.* concerning Tithes withheld by them from the parſon of the pariſh, and for not anſwering the commiſſary according to the ſtatute of 27 *H.* 8. *c.* 20. certifies their contumacy to two juſtices of the peace, by whoſe warrant they were ſeized and committed to priſon and being brought by *habeas corpus* into the king's bench, they applied to be diſcharged. Becauſe the new act concerning the affirmation

7 and 8 W. 3. c. 34.

ation of *Quakers*, gives the parſon a remedy to recover ſuch Tithes by virtue of a warrant of a juſtice of peace, then when a ſtatute gives remedy, the juriſdiction of the ſpiritual court is taken away, unleſs it be ſaved by the ſame ſtatute. And ſeveral ſtatutes were cited, where the juriſdiction of the ſpiritual court was ſaved.

But, *per curiam*, this laſt act ſeems to be only an accumulative remedy, and not to repeal the act of *H.* 8. And in many caſes the common law and eccleſiaſtical courts have concurrent juriſdiction: as, if a penſion be payable out of a parſonage by preſcription, the remedy for this is either in the ſpiritual court, or annuity lies for it at common law; though *Coke* ſays the contrary in his ſecond Inſtitute, in his comment upon the ſtatute *de circumſpecte agatis*. But where the nature of the offence is altered by a ſtatute, and a new penalty inflicted; then after the party has been tried at common law and condemned, the eccleſiaſtical court ſhall not proceed againſt him.

An exception was then taken to the return, becauſe it is ſaid that *Sanchee, &c.* were impriſoned in a ſuit for detention of Tithes or other eccleſiaſtical duties; and it

ought to appear for which the ſuit was ſpecially. For though the ſtatute that gives this remedy is in general words, yet in the return the cauſe of impriſonment ought certainly to be expreſſed, to the end that it may appear to the court that it was an eccleſiaſtical duty, for which they were impriſoned. And of this opinion were the whole court; and therefore the quakers were diſcharged out of cuſtody.

Note, in this caſe the following ſtatutes, deciſions, authorities, *&c.* were cited 7 and 8 *W.* 3. *c.* 34. *ſ.* 4. (which ſee *poſt*) 5 *Co.* 73 *b. W. Jones* 320. 23 *El. c.* 1. 1 *El. c.* 2. 13 *El. c.* 8. 3 *Inſt.* 152. 2 *Inſt.* 657. 13 *Ed.* 1 *St.* 4. *c.* 1. 2 *Inſt.* 491. 1 *Vent.* 3. 365. 1 *Mod.* 218. *Cro. Eliz.* 675.

By the 32 *H.* 8. *c.* 7. (which was alſo made upon occaſion of the diſſolution of monaſteries) it is enacted as follows:--- "Whereas divers and many perſons in- "habiting in countries and places of this "realm, and other the king's dominions, "not regarding their duties to Almighty "God, and to the king our ſovereign lord, "but in a few years paſt more contemptu- "ouſly and commonly preſuming to offend "and infringe upon the good and whole- "ſome laws of this realm, and gracious command-

" commandments of our ſaid ſovereign
" lord, than in time paſt have been ſeen
" or known, have not letten to ſubtract
" and withdraw the lawful and accuſtom-
" ed Tithes of corn, hay, paſturages, and
" other ſort of Tithes and oblations com-
" monly due to the owners, proprietaries,
" and poſſeſſors of the parſonages, vicarages,
" and other eccleſiaſtical places of and
" within the ſaid realm and dominions, be-
" ing the more encouraged thereto, for
" that divers of the king's ſubjects being
" lay perſons, having parſonages, vicar-
" ages, and Tithes to them and their heirs,
" or to them and to the heirs of their
" bodies lawfully begotten, or for term of
" life or years, cannot by the order and
" courſe of the eccleſiaſtical laws of this
" realm, ſue in any eccleſiaſtical court for
" the wrongful withholding and detaining
" of the ſaid Tithes and other duties, nor
" cannot by the order of the common laws
" of this realm have any due remedy
" againſt any perſon or perſons, their heirs
" or aſſigns, that wrongfully detaineth or
" withholdeth the ſame; by occaſion
" whereof much controverſy, ſuit, vari-
" ance, and diſcord is like to enſue among
" the king's ſubjects, to the great detri-
" ment, damage, and decay of many of

S. 2. " them, if convenient and ſpeedy remedy " be not therefore had and provided.

" Wherefore it is ordained and enacted, " by our ſaid ſovereign lord the king, and " with the aſſent of the lords ſpiritual and " temporal, and the commons in this pre- " ſent parliament aſſembled, and by the " authority of the ſame, that all and ſin- " gular perſons of this his ſaid realm or " other his dominions, of what eſtate, de- " gree, or condition ſoever he or they be, " ſhall fully, truly, and effectually divide, " ſet out, yield or pay all and ſingular " Tithes and offerings aforeſaid, accord- " ing to the lawful uſage and cuſtoms of " the pariſhes and places where ſuch Tithes " or duties ſhall grow, ariſe, come, or be " due. And in caſe that it ſhall happen " any perſon or perſons of his or their un- " godly perverſe will and mind, to detain " and withhold any of the ſaid Tithes or " offerings, or any part or parcel thereof; " then the perſon or perſons, being eccle- " ſiaſtical or lay perſon, having cauſe to " demand, or have the ſaid Tithes or of- " ferings, being thereby wronged or griev- " ed, ſhall and may convent the perſon or " perſons ſo offending before the ordinary, " his commiſſary, or other competent mi- " niſter, or lawful judge, having the par-

" ties

" ties or their lawful procurators before
" him or them, ſhall and may, by virtue
" of this act, proceed to the examination,
" hearing, and determination of every ſuch
" cauſe or matter, ordinarily or ſummarily,
" according to the courſe and proceſs of
" the ſaid eccleſiaſtical laws; and there-
" upon may give ſentence accordingly.

" And in caſe any of the parties for any S. 3.
" cauſe or matter concerning that ſuit, do
" appeal from the ſentence, order and de-
" finitive judgment of the ſaid ordinary,
" or other competent judge, as is afore-
" ſaid, then the ſame judge, by virtue of
" this act, forthwith upon ſuch appellation
" made, ſhall adjudge to the other party
" the reaſonable coſts of his ſuit therein
" before expended, and ſhall compel the
" ſame party appellant to ſatisfy and pay
" the ſame coſts ſo adjudged by compul-
" ſory proceſs and cenſures of the ſaid laws
" eccleſiaſtical, taking ſurety of the other
" party to whom ſuch coſts ſhall be ad-
" judged and paid, to reſtore the ſame coſts
" to the appellant, if afterwards the prin-
" cipal cauſe on that ſuit of appeal ſhall
" be adjudged againſt the ſame party to
" whom the ſaid coſts ſhall be yielded.
" And ſo every ordinary and competent
" judge eccleſiaſtical, by virtue of this act,

" ſhall adjudge coſts to the party upon
" every appeal to be made in any ſuit or
" cauſe of ſubtraction or detention of any
" Tithes or offerings, or in any other ſuit
" to be made for or concerning the duty of
" ſuch Tithes or offerings.

4. " And be it further enacted, by the au-
" thority aforeſaid, that if any perſon or
" perſons, after ſuch ſentence definitive
" given againſt them, obſtinately and wil-
" fully refuſe for to pay their Tithes, or
" ſuch ſum of money ſo adjudged, wherein
" they be condemned for the ſame, that
" then two juſtices of the peace for the
" ſame ſhire, whereof one to be of the
" *quorum*, ſhall have authority by this act,
" upon information, certificate, or com-
" plaint to them made by writing, by the
" ſaid eccleſiaſtical judge, that gave the
" ſame ſentence, to cauſe the ſame party
" ſo refuſing to be attached and commited
" to the next gaol, and there to remain
" without bail or main-prize until he or
" they ſhall have found ſufficient ſureties
" to be bound by recognizance, or other-
" wiſe, before the ſame juſtices, to the uſe
" of our ſovereign lord the king, to per-
" form the ſaid definitive ſentence and
" judgment.

" Provided

" Provided always, *&c.* that no perſon S. 5.
" or perſons ſhall be ſued, or otherwiſe
" compelled to yield, give, or pay any
" manner of Tithes for any manors, lands,
" tenements, or other hereditaments, which
" by the laws and ſtatutes of this realm,
" are diſcharged from, or not chargeable
" with the payment of any ſuch Tithes.

" Provided alſo, *&c.* that this act, nor S. 6.
" any thing therein contained, ſhall in any
" wiſe bind the inhabitants of the city of
" *London*, and ſuburbs of the ſame, for to
" pay their Tithes and offerings within the
" ſame city and ſuburbs, otherwiſe than
" they ought or ſhould have done before
" the making of this act.

" Provided always, *&c*, that in all caſes S. 7.
" where any ſuch perſon or perſons which
" now have, or which hereafter ſhall have
" any eſtate of inheritance, freehold, term,
" right, or intereſt of, in, or to any parſon-
" age, vicarage, portion, penſion, Tithes,
" oblations, or other eccleſiaſtical or ſpi-
" ritual profit, which now be, or which
" hereafter ſhall be made temporal, or ad-
" mitted to be, abide and go to, or in
" temporal hands, and lay uſes and pro-
" fits by the law and ſtatutes of this realm,
" ſhall hereafter fortune to be diſſeiſed,

" deforced wrongfully, or otherwiſe kept
" or put from their lawful inheritance,
" eſtate, ſeiſin, poſſeſſion, occupation, term,
" right, or intereſt of, in, or to the ſame,
" or of, in, or to any parcel thereof, by
" any other perſon or perſons, claiming or
" pretending to have intereſt or title in, or
" to the ſame, that then in all and every
" ſuch caſe or caſes, the perſon or perſons
" ſo diſſeiſed, deforced, or wrongfully kept
" or put from his or their right or poſ-
" ſeſſion, as is afore rehearſed, their heirs,
" wives, and ſuch other to whom ſuch in-
" jury and wrong ſhall be done or com-
" mitted, ſhall and may have their remedy
" in the king's temporal courts, or other
" temporal courts, as the caſe ſhall re-
" quire, for the recovery, getting, or ob-
" taining of ſuch inheritance, eſtate, free-
" hold, ſeiſin, poſſeſſion, term, right, or
" intereſt by writs original of *præcipe quod*
" *reddat, aſſiſe of novel diſſeiſin, mortdanceſtor,*
" *quoad ei deforceat*, writs of dower, or
" other writs original, as the caſe ſhall
" require, to be deviſed and granted in the
" king's court of chancery, of every ſuch
" parſonage, vicarage, portion, penſion, or
" other profit called eccleſiaſtical or ſpi-
" ritual, ſo to be demanded, according to
" the nature and cauſe of the ſuit thereof,
" in like manner and form as they ſhould,
" ought,

" ought, or might have had of or for
" lands, tenements, or other hereditaments,
" in ſuch manner to be demanded, and
" that writs of covenant, and other writs
" for fines to be levied, and all other aſſur-
" ances to be had, made, or conveyed
" (conceived) of any ſuch parſonage, vicar-
" age, portion, penſion, or other profit,
" called eccleſiaſtical or ſpiritual, as is
" aforeſaid, ſhall be hereafter deviſed and
" granted in the ſaid chancery, according
" as hath been uſed for fines to be levied,
" and aſſurances to be had or made, or
" conveyed of lands, tenements, or other
" hereditaments; and that all judgments
" to be given upon any of the ſaid writs
" original, ſo to be deviſed or granted of
" or for any of the premiſes, or any of
" them, and all fines to be levied and ac-
" knowledged in any of the king's ſaid
" courts thereof, ſhall be of like force and
" effect in the law to all intents and pur-
" poſes, as judgments given, and fines
" levied of lands, tenements, and heredita-
" ments, in the ſame courts upon writs
" original, duly purſued and proſecuted;
" albeit, no ſuch forms of writs original
" out of the ſaid court of chancery have
" heretofore proceeded or been awarded.

" Provided

S. 8. "Provided always, that this laſt act ſhall "not extend, nor be expounded to give "any remedy, cauſe of action or ſuit in "the courts temporal, againſt any perſon "or perſons who ſhall refuſe or deny to "ſet out his or their Tithes, or who "ſhall detain, withhold, or refuſe to pay "his Tithes or offerings, or any parcel "thereof; but that in all ſuch caſes, the "perſon or party, being eccleſiaſtical or "lay, having cauſe to demand or have the "ſaid Tithes or offerings, in every ſuch "caſe in the ſpiritual courts, according to "the ordinance in the firſt part of this act "mentioned, and not otherwiſe, any thing "herein expreſſed to the contrary thereof "notwithſtanding."

Deg. p. 2. c. 26. The following obſervations are made by Sir *Simon Degge* upon this act:

"That it appears by the preamble to be principally deſigned for the relief of lay impropriators, who before this act were not capacitated to ſue in the ſpiritual courts for the ſubtraction of Tithes, and were hard put to it to find any other relief.

"When, by the former act, the party for contumacy, *&c.* might be compelled to give ſecurity before ſentence; now, here-

by,

by, in the caſe of lay impropriators, the party cannot be compelled to give ſecurity until after definitive ſentence.

" By this ſtatute there muſt be two ſureties at leaſt; but upon the act one ſufficeth.

" The ſecurity on this act, as well as on the former, may be either by bond or by recognizance.

" He that will ſue upon this act, muſt ſue for the ſingle only, and not upon the double value, as upon 2 *Ed.* 6.

" That this act, as well as the former, extends to all manner of Tithes and offerings.

" That *London* is excepted out of this act, as it was out of the former.

" That this only extends to cuſtomary Tithes, and not for Tithes due by canon and eccleſiaſtical laws.

" That it only extends to ſuch as ſhall obſtinately and wilfully refuſe to perform the ſentence of the eccleſiaſtical judge, and for no other contempt or neglect.

That

"That this act reſtrains the ſuit to the eccleſiaſtical court upon this ſtatute; otherwiſe an action, as ſhould ſeem, might have been brought at common law upon this ſtatute for not ſetting forth, *&c.* of their Tithes."

1 Inſt. 159. a. And by my Lord *Coke*'s opinion, the above ſtatute does not only give remedy in the temporal courts for Tithes, but alſo for penſions and other eccleſiaſtical or ſpiritual profit, where the lay owner is diſſeiſed, deforced, wronged, or otherwiſe kept, or put from the ſame; alſo, for that Tithes and other eccleſiaſtical duties, which came to the crown by 27 *H.* 8. 31 *H.* 8. 37 *H.* 8. 1 *Edw.* 6. are by thoſe ſtatutes, and this of 32 *H.* 8. and 1 and 2 *Phil.* and *Mary*, in the hands of laymen, now become mere temporal inheritances, and ſhall be aſſets; huſbands ſhall be tenants by courteſy, and wives endowed of them, and have other incidents of temporal inheritances; only by this ſtatute they ſtill retained this eccleſiaſtical quality, that the owner might ſue for ſubtraction thereof in the ſpiritual court.

Noy. 137. And although by this ſtatute the appellant ſhall pay coſts of ſuit to the other party, yet it has been ruled that if ſentence be

be given in the ſpiritual court, and coſts there taxed, and the defendant brings an appeal, yet if the ſuit did not appertain originally to them, a prohibition ſhall be awarded as well to the coſts as to the principal ſuit. For that the ſtatute is to take place only when the cauſe properly belongs to the ſpiritual court.

And in *Tranſam*'s caſe: *A.* parſon of *B.* ſued for Tithes in the ſpiritual court; and *C.* the rector of *D.* came in *pro intereſſo ſuo* there, and ſaid, that the lands for which the Tithes are demanded were within this pariſh, upon which they were at iſſue, and it being found for him, ſentence was accordingly given for him. *A.* appeals, *&c.* and pending the appeal, coſts were aſſeſſed againſt him in the firſt court according to this ſtatute, and proceſs thereupon awarded. In this caſe *A.* (becauſe the iſſue was triable only at common law) brought a prohibition to the firſt court, from which he had appealed; but becauſe no ſuit was there depending, for that he had removed thence by appeal, a conſultation was awarded; and held that they might well proceed for the coſts; but if he had not removed his ſuit by appeal, a prohibition had been maintainable for him as to the coſts, as well

3 Cro. 178.
1 Leon. 130.

well as for the principal, although he was party to the libel.

3 Cro. 151. So alſo, if any one be ſued or drawn into the ſpiritual court for any matter contrary to the ſaid ſtatute, a prohibition lies.

2 Salk. 549. In the caſe of *Mauchin* v. *Maultin*, in a declaration *ſur* prohibition, the caſe was, that the plaintiff lived in *Nottingham*, within the province of *York*, and there ſubtracted Tithes, and then removed into the province of *Canterbury*; afterwards he happened to go to *York*, and was ſued there in the court of the archbiſhop for the ſubtraction aforeſaid, and had a prohibition on 32 *H.* 8. *c.* 8. for citing him out of his dioceſe. But at laſt, after debate, a conſultation was awarded; for that the ſubtraction of Tithes is local, and muſt be ſued before the ordinary of that place where the wrong was done; otherwiſe, in caſes tranſitory, *ubi forum ſequitur*, *&c.* And as it was argued by the counſel, this is not citing out of his dioceſe within the ſtatute, becauſe the dioceſe where he lives has not a juriſdiction; and if he might not be cited in this caſe, the thing would be remedileſs and diſpuniſhable.

Note,

Note, in the preceding caſe the following reports, *&c.* were cited: *Godb.* 191. 1 *Ro. Rep.* 328. 1 *Cro.* 97. 13 *Co.* 4. *Winch* 570. 2 *Ro. Rep.* 448. 3 *Mod.* 211. 2 *Brownl.* 12, 28. *Raym.* 95. *Lutw.* 1043, 1057, 1062, 1071.

But divers defects in the ſaid ſtatutes of 27 *H.* 8. *c.* 20. and 32 *H.* 8. *c.* 7. afterwards appearing, a further proviſion was made for enforcing and regulating the payment of Tithes, *&c.* by

2 and 3 *Edw.* 6. *c.* 13. which is as follows, *viz.* "Whereas in the parliament "holden at *Weſtminſter* the 4th day of "*February*, in the 27th year of the reign "of the late king, of moſt famous me-"mory, (King *Hen.* 8.) there was an act "made concerning the payment of Tithes "*predial* and perſonal; and alſo, in another "parliament held at *Weſtminſter* the 24th "day of *July*, in the 32d year of the reign "of the ſaid king, another act was made "concerning the true payment of Tithes "and offerings, in which ſeveral acts many "and divers things be omitted and left "out, which were convenient and very "neceſſary to be added to the ſame: in "conſideration whereof, and to the intent "the ſaid Tithes may be hereafter truely "paid,

" paid, according to the mind of the " makers of the ſaid acts; be it ordained " and enacted by, *&c.* that not only the " ſaid acts made in the ſaid 27th and 32d " years of the reign of the ſaid king *H.* 8. " concerning the true payment of Tithes, " and every branch and article therein con- " tained, ſhall abide and ſtand in their full " ſtrength and virtue; but alſo be it fur- " ther enacted, by the authority of this pre- " ſent parliament, that every of the king's " ſubjects ſhall from henceforth truly and " juſtly, without fraud or guile, divide, ſet " out, yield, and pay all manner of their " *predial* Tithes in their proper kind, as " they riſe and happen in ſuch manner and " form as hath of right been yielded, and " paid within forty years next before the " making of this act, or of right or cuſ- " tom ought to have been paid: and that " no perſon ſhall from henceforth take or " carry away any ſuch or like Tithes, " which have been yielded or paid within " the ſaid forty years, or of right ought to " have been paid in the place or places " Tithable of the ſame, before he hath " juſtly divided or ſet forth for the Tithes " thereof the tenth part of the ſame, or " otherwiſe agreed for the ſame Tithes with " the parſon, vicar, or other owner, pro- " prietor, or farmer of the ſame Tithes

under

" under the pain or forfeiture of treble
" value of the Tithes ſo taken and carried
" away.

" And be it alſo, *&c.* that at all times
" whenſoever, and as often as the ſaid pre-
" dial Tithes ſhall be due, at the Tithing
" time of the ſaving of the ſame, it is to
" be lawful to every party to whom any of
" the Tithes ought to be paid, or his de-
" puty or ſervant to view and ſee their
" ſaid Tithes to be juſtly and truly ſet
" forth and ſevered from the nine parts,
" and the ſame quietly to take and carry
" away; and if any perſon carry away his
" corn or hay, or his other predial Tithes,
" before the Tithe thereof be ſet forth, or
" willingly withdraw his Tithes of the
" ſame, or of ſuch other things whereof
" predial Tithes ought to be paid, or do
" ſtop, or let the parſon, vicar, proprietor,
" owners, or other their deputies or farm-
" ers to view, take and carry away their
" Tithes as is aboveſaid, by reaſon whereof
" the ſaid Tithe or tenth is loſt, impaired,
" or hurt, that then upon due proof there-
" of made before the ſpiritual judge, or
" any other judge to whom heretofore he
" might have made complaint, the party
" ſo carrying away, withdrawing, letting
" or ſtopping, ſhall pay the double value

" of the tenths or Tithes ſo taken, loſt, with-
" drawn, or carried away, over and beſides
" the coſts, charges, and expences of the
" ſuit in the ſame. The ſame to be re-
" covered before the eccleſiaſtical judge
" according to the king's eccleſiaſtical
" laws."

That no perſon ſhall be compelled to pay Tithes for any lands, *&c.* diſcharged of Tithes by the laws, *&c.* or by any privilege or preſcription.

That they ſhall pay their offerings yearly in the pariſh where they reſide.

That this act, nor any thing therein contained, ſhall not extend to *London*.

" That if any perſon do ſubtract or
" withdraw any manner of Tithes, obven-
" tions, profits, commodities, or other
" duties before-mentioned, or any part of
" them, contrary to the true meaning of
" this act, or of any other act heretofore
" made, that then the party ſo ſubtracting
" or withdrawing the ſame, may or ſhall
" be convented and ſued in the king's
" eccleſiaſtical court by the party from
" whom the ſame ſhall be ſubtracted or
" withdrawn, to the intent that the king's

" judge

" judge eccleſiaſtical ſhall and may, then
" and there, hear and determine the ſame
" according to the king's eccleſiaſtical laws.
" And that it ſhall not be lawful unto the
" parſon, vicar, proprietory, owner, or
" other their fermors or deputies, contrary
" to this act, to convent or ſue ſuch with-
" holder of Tithes, obventions, or other
" duties aforeſaid, before any other judge
" than eccleſiaſtical. And if any archbiſhop,
" biſhop, chancellor, or other judge eccle-
" ſiaſtical, give any ſentence in the afore-
" ſaid cauſes of Tithes, obventions, pro-
" fits, emoluments, and other duties afore-
" ſaid, or in any of them (and no appeal
" nor prohibition hanging) and the party
" condemned do not obey the ſaid ſen-
" tence, that then it ſhall be lawful to
" every ſuch judge eccleſiaſtical to excom-
" municate the ſaid party, ſo as afore con-
" demned, and diſobeying, in which ſen-
" tence of excommunication, if the ſaid
" party excommunicate, wilfully ſtand and
" endure ſtill excommunicate, by the ſpace
" of forty days next after, upon denunci-
" ation and publication thereof, in the
" pariſh church, or the place or pariſh
" where the party ſo excommunicate is
" dwelling or moſt abiding, the ſaid judge
" eccleſiaſtical may then at his pleaſure
" ſignify to the king in his court of

" chancery, of the ſtate and condition of " the ſaid party ſo excommunicate, and " thereupon to require proceſs *de excom-* " *municato capiendo* to be awarded againſt " every perſon as hath been ſo excom- " municate.

Deg. 381. Note, this clauſe extends to all manner of Tithes, offerings, obventions, and other church profits, *&c.* but this gives no double damages for them, as the former clauſe doth for predial Tithes. Next follows the clauſe in reſtraint of prohibitions:

" That if any party at any time here- " after, for any matter or cauſe before re- " hearſed, limited, or appointed by this " act, to be ſued or determined in the " king's eccleſiaſtical court, or before the " eccleſiaſtical judge, does ſue for any " prohibition in any of the king's courts, " where prohibitions before this time have " been uſed to be granted, that then in " every ſuch caſe the ſame party, before " any prohibition ſhall be granted to him " or them, ſhall bring and deliver to the " hands of ſome of the juſtices, judges of " of the ſame court where ſuch party de- " manded prohibition, the very true copy " of the libel depending in the eccleſiaſti- " cal court concerning the matter where-

fore

" fore the party demandeth the prohibi-
" tion, ſubſcribed or marked with the
" hand of the ſame party; and under the
" copy of the ſaid libel ſhall be written the
" ſuggeſtion, wherefore the party ſo de-
" mandeth the ſaid prohibition; and in caſe
" the ſaid ſuggeſtion, by two honeſt and
" ſufficient witneſſes at the leaſt, be not
" proved true in the court, where the ſaid
" prohibition ſhall be ſo granted within
" ſix month's next following after the ſaid
" prohibition ſhall be ſo granted and
" awarded, that then the party that is letted
" or hindered of his or their ſuit, in the
" eccleſiaſtical court by ſuch prohibition,
" ſhall upon his or their requeſt or ſuit,
" without delay, have a conſultation granted
" in the ſame caſe, in the court where the
" ſaid prohibition was granted, and ſhall
" alſo recover double coſts and damages
" againſt the party that ſo purſued the ſaid
" prohibition; the ſaid coſts and damages
" to be aſſigned or aſſented (aſſeſſed) by the
" court where the ſaid conſultation ſhall be
" ſo granted; for which coſts or damages
" the party to whom they ſhall be award-
" ed may have an action of debt by biil,
" plaint, or information, in any of the
" king's courts of record, wherein the de-
" fendants ſhall not wage his law, nor have

" any eſſoign or protection allowed or ad-
" mitted."

2 Inſt. 662. The word " rehearſed," made uſe of in the firſt part of this clauſe, ſeems very material for this additional act of 2 *Ed.* 6. for Sir *Edward Coke* ſays, but in as much as this act doth rehearſe the *ſtatutes* of 27 *H.* 8. 20. and 32 *H.* 8. *c.* 7. both which *ſtatutes* extend unto all kinds of Tithes, *viz.* predial, perſonal and mixt, and to offerings alſo; therefore this branch extendeth to them all. And it is to be obſerved, that this branch reſpecteth the cauſe of ſuit, *viz.* for Tithes or offerings, and not the cauſe of the prohibition.

But notwithſtanding the proviſions aforeſaid, there are divers clauſes in ſaid act, which, it is ſaid, have given ground to many prohibitions, as the following.

" That the aforeſaid clauſe, ſhall not ex-
" tend to give any judge eccleſiaſtical, any
" juriſdiction to hold plea of any matter,
" cauſe, or thing repugnant to, or againſt
" the effect, intent or meaning of the *ſta-*
" *tute* of *Weſtminſter* the ſecond, *c.* 5. the
" *ſtatutes* of *articuli cleri*, *circumſpecte agatis*,
" *ſylvæ cæduæ*, *the treatiſe de regia prohibi-*
" *bitione*, nor againſt the *ſtatute* of *anno*
" *prim*

" *primo Edwardi tertii c.* 10. or any of them,
" or to hold plea in any matter wherein the
" king's court ought to have juriſdiction,
" any thing therein contained to the con-
" rary thereof in any wiſe notwithſtanding."

And another clauſe is added againſt Tithes of marriage goods in *Wales*, *&c.* which ſee before, and divers other clauſes of this *ſtatute* in the ſeveral parts of this book.

In the caſe of *Heale* v. *Spratt*. In a pro- 2 Inſt. 649.
hibition, *Walter Heale* ſet out his predial Tithes, and divided them juſtly from the nine parts, and ſoon after the ſame carried them away. *Sprat* ſued for ſubſtraction of the ſame in the eccleſiaſtical court, *Heale* pleaded, that he had ſet them out *ut ſupra*, whereunto *Sprat* ſaid, that preſently after his ſetting out, *&c.* he carried them away, *in fraudem legis*. Adjudged, that this was fraud and guile within this act, albeit he did juſtly divide the ſame within the letter of this law. It was further reſolved, that if the owner of the corn before ſeverance grant the ſame to another of intent, that the grantee ſhould take away the ſame, to the end to defraud the parſon, *&c.* of his Tithe, this is fraud and guile within the *ſtatute*.

2 Inſt. 650. The *ſtatute* 2 *Ed.* 6. not directing who was to have the penalty, it remained for ſome time in doubt; but in the caſe of the *Attorney General* v. *Wood*, an information was exhibited by the *Attorney General* v. *Deft*, for this treble forfeiture, for carrying away his Tithes before they were juſtly divided. The defendant pleaded not guilty, and by a jury at the bar, he was found guilty; and in arreſt of judgment, it was moved, that in this caſe the forfeiture was not given to the king. For that the words of the act be, "under the pain of the forfeiture of the treble value of the Tithes ſo taken away." And whenever a forfeiture is given againſt him, that doth diſpoſſeſs, *&c.* the owner of his property, as here he doth of his Tithes, there the forfeiture is given to the party grieved or diſpoſſeſſed, and the rather for this is an additional law as hath been ſaid, and made for the benefit of the proprietor of the Tithes. And ſo it was adjudged by Sir *Roger Manwood* and the whole court of exchequer. And this was the firſt leading caſe that was adjudged upon this point, and ever ſince it hath been received for law, that the party intereſted in the Tithes, ſhall, in an action of debt, recover the treble value.

In one of the clauſes, the forfeiture is of treble the value, and in a ſubſequent clauſe the forfeiture to be recovered in the eccleſiaſtical court, is of double the value only.

And the reaſon for this is, that in the eccleſiaſtical court, he ſhall recover the Tithes, themſelves and therefore the value recovered in the eccleſiaſtical court is equivalent with the treble forfeiture at the common law.

So as the ſuit is more advantageous in the eccleſiaſtical court, then the ſuit for the treble value at the common law. For at the common law he ſhall recover no coſts, but he ſhall recover in the eccleſiaſtical court coſts and expences.

But then it is demanded, whether in an action of debt for the treble value at the common law, if the plaintiff be nonſuit, or if the verdict paſs for the defendant, the defendant ſhall recover his coſts by the *ſtatute* of 23 *H.* 8. *c.* 15. And the anſwer is, that he ſhall recover no coſts, and ſo it was adjudged in the caſe of *Dounton* v. *Finch.* In action of debt upon this *ſtatute*; That this action of debt is no action of debt within the *ſtat.* 23, *H.* 8. becauſe it is neither upon a ſpecialty or by contract; neither 2 Inſt. 651.

neither is this action upon this *ſtatute* any action for wrong perſonal, immediately done to the plaintiff, for this is a *non feaſance* and not a *misfeaſance*, *viz.* a not ſetting out of the Tithes.

3 Burr. 1873. In the caſe of *Chave* v. *Peter Calmel*, Eſq. A prohibition was moved for, to the conſiſtorial court of the biſhop of *Exeter*, to ſtay their proceeding in a cauſe inſtituted there, for ſubduction of Tithes.

The ſhort of the caſe was, that *Calmel* the impropriator, had employed one *Finnimore* as his agent, to collect and compound for Tithes. The plaintiff in prohibition had agreed with *Finnimore*, after the corn was cut and ready to be houſed, for purchaſing the ſame; whereupon he houſed his whole crop, without ſetting out the Tithe. *Chave's* agreement with *Finnimore* was only by parol. The impropriator libelled in the eccleſiaſtical court againſt *Shave* for not ſetting out his Tithes. The defendant below tendered the 5*l.* and offered a plea, that he had purchaſed the the Tithes for 5*l.* The eccleſiaſtical court rejected this plea. The queſtion was, whether this was matter of appeal or prohibition.

The

The court were unanimous in the latter opinion. And they ſounded it upon this rejection of the plea, being *a gravamen irreparibile*; and upon an apprehenſion, that the eccleſiaſtical court muſt have grounded their rejection, upon a ſuppoſed difference between their law and ours; that is to ſay, they took it for granted, that the eccleſiaſtical court were of opinion agreeable to what is laid down by their favourite writer, *Gibſon* (who takes it from a note in *Noy*) Noy 19. That an agreement with the agent of the proprietor of the Tithes will not bind the proprietor; whereas, by our law and in common ſenſe, and common juſtice, a compoſition by the occupier with the agent of the proprietor, does bind and ought to bind his principal.

Indeed, when the eccleſiaſtical court have juriſdiction, and proceed therein, according to their law, where it does not differ from ours, the rejection of a plea would be matter of appeal.

But where the eccleſiaſtical law differs from the common law; and the eccleſiaſtical court would require greater proof from the defendant below, than the common law requires; or would eſteem an agreement not to bind the impropriator, which

at

at common law would bind him; there an appeal could be of no ſervice to the defendant in the eccleſiaſtical court, becauſe the ſuperior eccleſiaſtical court would equally adhere to their own law, as the inferior eccleſiaſtical court had done; and would determine alike, as being guided by the ſame principle of determination. Therefore as the judges of this court ſuppoſed, that in the preſent caſe, the judge of the conſiſtory court rejected the plea, becauſe he thought the agreement with the agent not binding upon Mr. *Calmel* the principal, which at common law did bind him, they held this to be matter of prohibition and not of appeal.

And though it had been obſerved, that Tithes lie in grant, yet they had no doubt, that the occupier might with ſufficient propriety, be ſaid to have purchaſed theſe Tithes, notwithſtanding the contract was only by parol. For whatever might have been objected to its not having been made by deed, if this corn had been ſtanding, or if it had been a ſale by the proprietor of the Tithes to a third perſon; yet the preſent caſe is by no means liable to ſuch an objection; for the corn was here ſevered from the ground, and ready to be houſed; and it was not a ſale of the Tithes by the

proprietor to a ſtranger, but a compoſition between the proprietor and occupier, *pro hac vice tantum.*

And it is to be obſerved, that the treble value only, and not the Tithes themſelves, nor any ſatisfaction for them, may be recovered in the temporal court: that being out of the juriſdiction of thoſe courts, and wholly in the ſpiritual courts. Which is the reaſon why in all ſuits upon this *ſtatute*, the action is not laid for ſubtraction of Tithes, but for a contempt of the *ſtatute* in not ſetting them out.

It hath been held that an action for not ſetting forth of Tithes, is not within the *ſtatute* of limitations; that *ſtatute* not extending to actions grounded on acts of parliament; therefore the plaintiff is not confined by law to bring his action, within ſix years, or to any other time certain.

As in the caſe of *Marſton* and *Cleypole*. Bill, by a lay impropriator for Tithes, for about 24 years. The defendant as to ſuch part of the bill, as prayed diſcovery and relief for any time within ſix years next before the filing of the bill, or ſerving the *ſubpæna*, pleaded the *ſtatute* of limitations, and that he did not promiſe to make any ſatisfaction Bunb. 213.

ſaction for Tithes, before the ſaid ſix years; but it was overruled by the court; becauſe the defendant as to Tithes, is only in nature of a receiver or bailiff, for the plaintiff; in which caſe the *ſtatute* of limitations doth not operate.

2 Cro. 269. 12 Co. 65. In *Roberts*'s caſe, a prohibition had been granted in a caſe of ſubtraction of Tithes, upon ſurmiſe, that the plaintiff (being defendant in the ſpiritual court) had but one witneſs in that court to prove his demiſe, which that court would not allow for proof, for that *ſingulis teſtis* is not allowable by their law. And upon conſideration and ſight, of a prohibition, granted in the ſame cauſe, it was reſolved by *Coke*, chief juſtice, and the whole court, that a conſultation ſhould be granted, for if ſuch ſurmiſe ſhall be allowed, then in every caſe for a mere delay, ſuch a ſurmiſe may be made; for when the defendant in the ſpiritual court ſhall ſurmiſe, that he hath but one witneſs, the plaintiff there cannot deny it, and ſay that he hath two or more, for then he affirms matter againſt himſelf, and when the ſpiritual court hath juriſdiction of the principal cauſe, they determine the acceſſary. But it was objected, that if *A* claiming by leaſe, from *B.* of a rectory, libels for ſubſtraction of Tithes, and the defend-

ant

ant pleads a former releaſe made by *B.* to *C.* and the defendant hath but one witneſs in the caſe to prove the former leaſe; if no prohibition ſhall be granted, the defendant ſhall be charged, and if *C.* ſue him upon the *ſtatute* 2 *Ed.* 6, at the common law, the teſtimony of one witneſs only will be there ſufficient, and ſo he ſhall be charged twice. To which it was anſwered, that firſt the fault was the defendants, that he would not ſet forth his Tithes, for then, he ſhall not be charged whoever takes them. But in ſuch a caſe, thoſe in the eccleſiaſtical court, will, upon one good witneſs, and any concurrent vehement preſumption, as poſſeſſion or the like, allow of ſuch a proof; and the teſtimony of one witneſs in our law, is no concluſive evidence, but ought to be left to the conſcience of the jury, and ſo the validity or invalidity of proof of matters of fact, ſhall be left to them. But if a queſtion at the common law ariſe from the party upon the conſtruction of a *ſtatute*, or the like, and thoſe of the eccleſiaſtical court will take upon them to judge of it againſt the rule of law; there upon ſpecial ſurmiſe of it, and upon the ſhewing of the anſwer or other pleadings of the parties, by which it appears to the court, that ſuch ſurmiſe is a good ground for a prohibition it ſhall be granted; for

matter

matter in law ariſing upon eſtates or intereſts granted by the common law, and conſtruction of *ſtatutes*, ought to be made according to the rule of common law, *et non debet trahi ad aliud examen.*

The judgment that proves, that the acceſſary is to be tried in the eccleſiaſtical court, when it hath juriſdiction of the principal was cited by *Coke* and reported by him in the ſaid caſe of *Roberts*: which is this, *Fuller* brought a prohibition againſt *Clements*, and *Wiſkard*; and *Fuller* counted that he himſelf was owner of the rectory of *A.* and libelled in the ſpiritual court againſt *Clements* for ſubſtraction of Tithes, pendant which ſuit the ſaid *Wiſkard pro intereſſe ſuo*, made theſe allegations againſt the ſaid *Fuller*.

That the ſaid rectory was impropriate to the monaſtery of *Wendling*, and granted by Queen *Elizabeth* to *M.* and *Hall*, who enfeoffed *Bazome* who let it to *Wiſkard* for forty years, and proved theſe allegations by witneſſes, and had ſentence againſt *Fuller*, who was condemned in coſts, 8*l.* 10*s* to *Clements*, and 13*l.* 6 to *Wiſcard*; and after *Fuller* did appeal, to the court of the arches; and there *Fuller* claimed the rectory, by reaſon *Hall* was ſeiſed of it, and by his deed

did

did give and grant the ſaid rectory, and all lands and Tithes to it appertaining, to Sir *Edward Cleve* before the feoffment ſuppoſed to be made to *Bazome*, and that Sir *Edward Cleve*, by his deed, did infeoff *Fuller*, and although that he offered to prove the delivery of the deed of the feoffment to Sir *Edward Cleve* by one ſole witneſs, the eccleſiaſtical court would not allow it without producing another witneſs. And Fuller ſaid that although he had alſo alledged there, that theſe were matters determinable at common law, notwithſtanding which they gave ſentence.

The defendants for to have a conſultation pleaded, that *Fuller* in the ſaid court of arches, proved the delivery of the deed aforeſaid by Sir *Edward Cleve* and others, but could not prove livery and ſeiſin according to the deed, and for this cauſe, ſentence was given without that, that the judges of the arches would not admit of the ſaid proof, unleſs he proved the deed by other witneſſes; upon which *Fuller* demurred in law.

And it was objected by *Fuller's* counſel.

Firſt, that *Wiſkard*, who is a mere ſtranger to the ſuit, and comes in *pro intereſſe ſuo* in the ſaid rectory, pleads matter merely determinable at the common law, *i. e.* letters patents, feoffment, and leaſe for years; and, on the other part, *Fuller* claims an eſtate in the ſaid rectory by conveyance at the common law. And now the queſtion in the eccleſiaſtical court being only, who hath the beſt eſtate in the ſaid rectory by the common law, this ought to be tried by the common law, and not in the eccleſiaſtical court; for this is the birthright of the ſubject, to have his inheritance and freehold tried and determined by the common law, for the civil law differs much in the trial of inheritances.

Second, it was objected, that the matters in law, ought to be determined by the judges of the law, and in this caſe matter of law ariſing, *viz.* if a man hath a rectory impropriate which conſiſts in glebe and Tithes, and by his deed gives and grants the ſaid rectory and all lands and Tithes any ways belonging or appertaining to it, to another and his heirs, and no livery is made; in this caſe, whether the Tithes ſhall paſs or not, for the Tithes may paſs without any livery, this queſtion is not fit to be determined by the eccleſiaſtical judges,

but

but by the judges of the common law, *Quod quisque novit in hoc se exerceat.*

Third, it was objected, that *Wiskard* was a mere stranger to the suit, and all his allegation is temporal, and for that it is a stronger case to maintain a prohibition, for as much as between him and *Fuller*, nothing is in question, but to whom the inheritance of the rectory belongs; but *Clement*, who is sued for substraction of Tithes, hath greater colour in his defence, being lawfully sued in the ecclesiastical court, but all his allegation, as hath been said, is temporal.

Fourth, it was objected that *Fuller* had but one witness to prove the delivery of the deed, and in the ecclesiastical law, *unus testis est nullus testis*; for all which causes it was prayed, that the prohibition might stand, and that no consultation might be awarded.

To which it was answered and resolved, by Sir *Christopher Wray*, chief justice, and the whole court.

As to the first objection, that forasmuch as the original belongs to the ecclesiastical court, the determination of all that depends upon it, belongs to the judges of the same court, although that the matter be triable

at the common law; but when the original matter belongs to the common law, and there commenced, and iſſue be taken upon the matter triable by the eccleſiaſtical law, there the judges of the common law ſhall write to the judges of the eccleſiaſtical law, to try it and certify, *&c.* And the reaſon of this diverſity is, that our judges have authority to write and command them by the king's writ, to certify them of their law, but they cannot write to the judges of our law to try any thing, and to certify them, for that they have no ſuch authority to command by writ, *&c.*

To the ſecond, it was anſwered and reſolved, that if upon conference with men learned in the law, they give ſentence according to law, this is well done and no prohibition ought to be granted; but if they take upon them to draw the intereſt of any man, *ad aliud examen*, and to judge againſt the rule of law concerning the inheritance or intereſt of any, there a prohibition lies. And in the caſe at the bar, they did well reſolve the law; for by the ſaid livery of the charter, the Tithes did not paſs as in groſs, for that the intention of the parties was to paſs the intire rectory by feoffment, and not to paſs the Tithes only ſeparate from it, for that would

would be to diſmember the rectory into fractions by a conſtruction of law, contrary to the intention of the parties.

As to the third objection, it was anſwered and reſolved, that by the eccleſiaſtical law a ſtranger may come in *pro intereſſe ſuo*, and when they have juriſdiction of the original cauſe of ſuit, we ought not to draw in queſtion their order or proceeding, but if they proceed *inverſo ordine*, not obſerving form, this ought to be redreſſed by appeal, and although that the matter depending upon the original cauſe, be determinable by the common law, yet it ſhall be determined as hath been ſaid by the eccleſiaſtical court.

As to the fourth objection, it was anſwered and reſolved, that ſuch ſurmiſe, that he hath but one witneſs, is not ſufficient to have a prohibition, for that the eccleſiaſtical court hath juriſdiction of the principal; and if ſuch a ſurmiſe ſhall be ſufficient, all ſuits in the eccleſiaſtical court ſhall be either delayed or quite taken away, for ſuch a ſurmiſe may be made in every caſe, and the plaintiff in the eccleſiaſtical court, cannot have any good anſwer to it, to have a conſultation, which agrees, ſaith *Coke*, with the reſolution in *Robert*'s caſe.

2 Roll. Abr. 299. In the caſe *Yolle*, v. *Sir Edward Powell*, it was held, that if a parſon ſued upon the *ſtatute* of 2 *Ed.* 6. in the ſpiritual court, for the double value, for not ſetting forth of Tithes, and the defendant to have a prohibition ſurmiſed, that he ſet them forth, and that they would not admit the proof thereof by one witneſs, that no prohibition lies, for that they have cognizance of the matter.

And in 2 *Inſt.* 608. it is ſaid as follows; there is a new deviſed ſuggeſtion in the temporal courts, commonly received and allowed, whereby they may at their will and pleaſure, draw any cauſe whatſoever from the eccleſiaſtical court: for example, many prohibitions have lately come forth upon this ſuggeſtion, that the laws eccleſiaſtical do require two witneſſes, where the common law accepteth of one; and therefore it is *contra legem terræ*, for the eccleſiaſtical judge to inſiſt upon two witneſſes to prove his cauſe; upon which ſuggeſtion, although many conſultations have been granted (the ſame being as yet no way able to warrant and maintain a prohibition) yet becauſe we are not ſure, but that either by reaſon of the uſe of it, or of ſome future conſtruction, it may have given to it more ſtrength than is convenient, the ſame tending to the utter overthrow

overthrow of all eccleſiaſtical juriſdiction, we moſt humbly deſire, that by your lordſhips good means, the ſame may be ordered to be no more uſed.

Anſwer—If the queſtion be upon payment or ſetting out of Tithes, or upon the proof of a legacy or marriage, or ſuch like incidence, we are to leave it to the trial of their law, though the party have but one witneſs; but where the matter is not determinable in the eccleſiaſtical court, there lieth a prohibition either upon, or without ſuch a ſurmiſe.

Note, the above is one of the articles, drawn up and preſented by *Richard Bancroft*, archbiſhop of *Canterbury*, to the lords of the privy council, with the anſwer thereto, by all the judges of *England*, and barons of the exchequer, delivered under their hands with one conſent, in *Eaſter* term, 4 *Jac.*

But in a prohibition ordained upon a ſurmiſe, that a parſon had ſued in the ſpiritual court for the Tithe of pidgeons; the defendant there, had paid the ſaid Tithe, and proved it by one witneſs. And the court chriſtian would not allow the proof without two witneſſes, the prohibition was affirmed. Moor 909. 41 Eliz.

Roll. 1. Rep. 61. In the caſe of *Worts* v. *Clifton*, the ſuggeſtion was, that the defendant in the ſpiritual court, claimed the Tithes by a leaſe from the parſon, of an older date than the plaintiff had ſued him for them, there by force of a later leaſe by the ſame parſon, ſo that the queſtion was, which of the two leaſes ſhould be preferred, a prohibition was awarded; and though *Crook* held that a conſultation ſhould be granted upon 1 *Reg.* 2. *c.* 4. that where the ſpiritual court hath juriſdiction of the principal, there if an acceſſary come triable at the common law, that alſo ſhall be tried there; yet *Coke* ſaid, that in one *Fuller's* caſe, there was a ſuit in the ſpiritual court for Tithes, and the title made by the grant of the rectory, and the other made title by a former grant, and a prohibition was granted; yet he agreed, 1 *Reg.* 3 & 4, unleſs the ſpiritual law differs from our law, as their law is, that a gift of goods is not good without tradition, but otherwiſe it is at our law; and *Dodderidge* ſaid, that the principle matter here, which is the leaſe, is temporal not ſpiritual, therefore is not within the rule, 1 *B.* 3. but true it is, that if the original be ſpiritual, then the acceſſary ſhall be tried there alſo, otherwiſe not; all which was granted by *Coke*, who alſo ſaid, that if a man make Tithe in the

ſpiritual

ſpiritual court, by force of a leaſe of the proprietor, and the defendant deny the leaſe, a prohibition ſhall be granted and in this caſe a prohibition was granted.

And a prohibition was prayed to the eccleſiaſtical court, on a ſuggeſtion, that the trial of all letters patent, and grants of the king ought to be at the common law, and not in the eccleſiaſtical court; and that the defendant had libelled in the ſpiritual court for Tithes, and that his title was by the king's letters patent, whereas the plaintiff (who prayed the prohibition) had a more ancient right to the ſaid Tithes, by other former letters patents of the king, but the libel in this caſe in the ſpiritual court was only in the common form, *viz.* that he was proprietor of the Tithes, without making any other title; but upon the proceedings the title did appear to be by letters patents on both ſides. And by *North*, *Wyndham*, and *Charleton*, a prohibition was granted; for that the eccleſiaſtical court was not to try the validity of the letters patents; but *Levinz contra* the ſuit in the eccleſiaſtical court being grounded only upon the wrong of ſubſtracting the Tithes; and if the Tithes come in queſtion there, 'tis only as an incident, and ſaid, that when the foundation of the libel is for a ſpiritual matter, 3 Lev. 71.

and

a temporal matter falls in incidently to be queſtioned there, the eccleſiaſtical court ſhall try ſuch temporal matter, ſo that they proceed according to the rules of the common law, and cited 12 *Co.* 65. 1 *R.* 13. 4. *Reg.* 57. 3 *Cro.* 466. 788. But the prohibition was granted by the three other judges.

p. 219. In Mr. Juſtice *Buller's* introduction to the law of *niſi prius*. It is ſaid, the rule is, that where the eccleſiaſtical court proceeds in a matter merely ſpiritual, if they proceed in their own manner, though that is different from the common law, no prohibition lies; as in probate of wills, if they refuſe one witneſs, but if they have conuſance of the original matter, and an incident happen which is of temporal conuſance, or triable at common law, they muſt try it as the common law would, as in a ſuit for a legacy; if the defendant plead a releaſe or payment, they muſt admit the evidence of one witneſs; but if they admit the proof, they are to judge whether he be credible or not: therefore if they determine againſt his evidence, the party has no remedy but by appeal.

2 Salk, 547. And the caſe of *Shotter* v. *Friend*, an executor being ſued for a legacy in the ſpiri-

tua

tual court pleaded payment and offered to prove it by one witneſs, which the judge refuſed and gave ſentence againſt him, upon this matter ſuggeſted, a prohibition was moved for. And by the court.

Where the eccleſiaſtical court proceed in a matter merely ſpiritual, if they proceed in their own manner, though that is different from the common law, no prohibition lies, as in probate of wills; there if they refuſe one witneſs, no prohibition lies.

Where they have conuzance of the original matter, and an incident happens which is of temporal conuſance or triable by the common law, they ſhall try the incident, but muſt try it as the common law would. Thus in a ſuit for Tithes or for a legacy, if the defendant pleads a releaſe or payment, or in a ſuit to prove a will if the defendant pleads a revocation. So in the caſe at bar they ſhall try the matter of payment or no payment, but then they muſt admit ſuch proof as the common law would, or otherwiſe they reject the cauſe themſelves and ought to be prohibited.

A bare ſuggeſtion, that the defendant has but one witneſs, and that they take exceptions to his credit and reputation, is no cauſe

cauſe of prohibition; for if they admit the proof of one witneſs, whether he be a credible witneſs or not, they ſhall judge, and the party has no remedy but by appeal.

That it is not too late to come for a prohibition after ſentence, for the ſentence in this caſe is the grievance.

And the court made the rule for prohibition abſolute.

Note in this caſe the following authorities *&c.* were cited. *Noy* 12. 2 *Ro.* 300. 1 *Ro. Rep.* 12. 2 *Ro. Rep.* 42. *Yelv.* 92. *Hob.* 301. 3 *Bulſt.* 11. 1 *Show.* 158, 172. *Raym.* 123, 189, 219. *Cro. El.* 8, 666. *Latch.* 117. *Moor* 568.

2 Roll. Abr. 305.

In the caſe of *Griffin* v. *Bulſuſt*, a parſon compounded with a pariſhioner for his Tithes, and granted them by deed to him for a certain ſum by the year, according to the agreement, and afterwards he ſhall ſue the pariſhioner in the eccleſiaſtical court for the Tithes in kind, no prohibition ſhall be granted upon this diſcharge by deed, for they may very well try it, having conuſance of the principal.

In

In the caſe Dr. *Pocklington* v. Sir—*St. John*, the parſon by deed leaſed the Tithes of his pariſh, and after ſued for the ſame in the ſpiritual court, and there this leaſe is pleaded, and the queſtion between them was, whether the Tithes of all the pariſh or only of ſome particular things were let; yet no prohibition lies, for that they have conuſance of the original, and they ought to take advice of them that be learned in the common law for their direction, as the judges of the common law, take advice of them; but if they judge contrary to the common law, prohibition lies after ſentence. 2 Roll. Abr. 306.

If *A.* the parſon of *B.* ſues for Tithes in the ſpiritual court, againſt *C.* who pleads a leaſe for years made to him by the parſon, and the parſon replies, that he was non reſident, and abſent by the ſpace of eighty days and more, in ſuch a year, *&c.* from his benefice, by which the leaſe became void; no prohibition lies upon this plea, although that it be grounded upon the *ſtatute* 13 *Eliz.* and although it was objected, that the judges of the ſpiritual court ſhall not have the expoſition of a *ſtatute*, yet becauſe they have juriſdiction of the original cauſe, they ſhall have power to try that which is the acceſſary ariſing thereupon, as in the caſe of *Lucy* v. *Lucy*, 2 *Rolls Abr.* 308.

Holt

2 Ld. Raym. 291.

Holt chief juſtice. It was formerly held by all the judges of England, that when there was a proceeding *ex officio* in the eccleſiaſtical court, they were not bound to give the party a copy of the articles; but the law is otherwiſe, for in ſuch caſes, if they refuſe to give a copy of the articles, a prohibition ſhall go *quousque* they deliver it, and accordingly upon motion a prohibition was granted in the like caſe per *Holt et curiam.*

If a perſon be ſued for Tithes of lands, not Tithe free, and plead a preſcription for a ſpecial matter of Tithing which is not refuſed, or if ſued for a *modus decimandi* originally, pleading another *modus*, and his plea is *bona fide* allowed, ſhall ſurmiſe falſely a refuſal of his plea, and for that cauſe only a prohibition ſhall be granted; the queſtion is, whether ſuch ſurmiſe of a refuſal may be traverſed, that is, when the matter or ground of the prohibition is only the refuſal. And it is ſaid, though the temporal courts will take notice that no *modus* is allowed in the ſpiritual courts, yet a *modus* muſt have been ſuggeſted to have been pleaded there in time; as in the caſe of *Meſſenger* v. *Jennings*, 3 *Keb.* 721.

And

And generally where a ſuit is commenced in the ſpiritual court, prohibitions are not granted till after plea there pleaded, 1 Keb. 387. Sid. 100. Keeb. 433. 721. Moor 525. 2 Co. 44. 45.

Suppoſing that a *modus decimandi*, or a preſcription of a manner of Tithing is triable in the ſpiritual court, if in a ſuit there for a *modus decimandi*, another *modus* be pleaded, or that there is no ſuch *modus*, and that plea is refuſed: or if in a ſuit for Tithes of lands not Tithe free, a preſcription is pleaded as to the manner of the Tithing, and that plea is refuſed, and a prohibition being moved for, upon ſuggeſtion of ſuch refuſal, the refuſal being the principal matter of the ſuggeſtion, is therefore traverſable; and in all caſes where the principal matter is proper to the ſpiritual court, there no prohibition ſhall be granted, till plea refuſed. The courts of common law, alſo upon ſuggeſtion of ſuch refuſal, do oblige the party to make oath of the truth of ſuch his ſuggeſtion, and will not grant any prohibition without ſuch oath.

In the caſes of *Darby* v. *Cozens Clk.* and *Notley* v. *Same.* The defendant who was vicar of *Long Burton*, in the county of *Dorſet* in the year 1784 libelled both theſe plaintiffs in the eccleſiaſtical court of the dean of the cathedral church of *Sarum* for Tithes. The plaintiff Ter Rep. B. R. 552.

plaintiff, *Darby*, pleaded the following *modus* or preſcriptive or cuſtomary payments, which he ſtated to have been paid immemorially: namely, 2s. 10d. for the farm and lands called *White-houſe Farm*, and 6s. for a farm and lands called *Hutchins* (being the ſame eſtate for the Tithes of which the plaintiff was libelled) in lieu of all vicarial Tithes, and Tithable matters within and upon the ſaid farms, payable at *Lady Day* yearly. On the 2d of *July*, 1785, there was an interlocutory decree in the decanal conſiſtorial court of *Sarum*, that the anſwer of the preſent plaintiff to the third and fifth article of the libel, which were for agiſtment Tithes, and the Tithes of the produce of a garden and orchard, was not ſufficiently full, and that the plaintiff ſhould make a fuller anſwer to thoſe articles. From this he appealed to the arches court of *Canterbury*, when Dr. *Calvert*, official principal of the ſaid court, on the 11th of *July*, 1786, pronounced the preſent plaintiff's anſwer to the third and fifth articles of the libel not to be ſufficiently full and explicit, remitted the cauſe to the court below, and condemned the plaintiff in the coſts of the appeal.

The

The plaintiff *Notley* pleaded a ſimilar *modus*, in lieu of the vicarial Tithes for his lands: And upon a decree in the dean's court, that his anſwer was inſufficient, he likewiſe appealed to the court of arches, where his appeal was diſmiſſed in ſimilar manner as that of the plaintiff *(Coſins)*, and he was alſo condemned to pay the coſts of the appeal.

And two rules to ſhew cauſe why writs of prohibition ſhould not iſſue to prohibit the court chriſtian of the dean of the cathedral church of *Sarum* further holding plea of the matter there depending between the parties. The court deſiring that both theſe rules ſhould be heard together.

And againſt the prohibition it was ſaid: That where an inferior court has original conuſance of a cauſe, it has been decided in many caſes, that if a party applies for a prohibition after ſentence, he comes too late. In the preſent caſe, the libel being for Tithes, the dean's court had original juriſdiction of the ſuit. And though after pleading the *modus*, the plaintiff might have applied for a prohibition, yet by making no objection to the juriſdiction of the court till after the interlocutory decree, and thereby putting the defendant to a great

and unneceſſary expence, he has precluded himſelf from applying for a prohibition now. In the caſe of *Fuller* v. *Hutchins*, the true diſtinction is taken by Lord *Mansfield*, between thoſe caſes, where the court will or will not grant a prohibition; and it was there held, that after a party has lain by and ſuffered the eccleſiaſtical court to proceed to ſentence, a prohibition ought not to be granted, if the court below had original juriſdiction of the cauſe. But even ſuppoſing that the court of arches were wrong in their judgment, and that they ought to have awarded coſts to the defendant, a court of common law cannot reviſe their deciſion upon that point; becauſe the party might have appealed to the court of delegates. And where a party has a remedy by appeal, no prohibition lies. The court delivered their opinion as follows, *viz.*

Cowp. 422.

Aſhurſt J. This court, even in this ſtage of the buſineſs, muſt grant a prohibition to both the courts. It is very clear that an eccleſiaſtical court cannot proceed in any cauſe where they have not an original juriſdiction of the ſubject matter; and if they do, a prohibition goes of courſe; or where any incidental matter intervenes, by which they are ouſted of their original juriſdiction, in that caſe alſo a prohibition muſt go.

Now

Now I take that to be the caſe here; for though there is no doubt but that the eccleſiaſtical court have an original juriſdiction over matters of Tithes; yet the inſtant the *modus* was pleaded, their juriſdiction was at an end. It has been ſaid, that this is only an interlocutory decree as to the inſufficiency of the plea in point of form, I do not ſay what the court would do: but here it does not appear that this is a mere matter of form; for they judge the anſwer to be inſufficient as to two of the articles. And therefore we muſt exerciſe our own judgment, and examine, whether on the face of the proceedings the plea appears to be inſufficient: for the plea ſtates, that the *modus* is in lieu of the vicarical Tithes; and that is an anſwer to the whole charge contained in the libel. If the court below could by any interlocutory decree adjudge the anſwer to be inſufficient generally, without aſſigning any reaſon for their opinion, it would preclude this court from granting a prohibition in any caſe. But this court will not ſuffer their hands to be tied up by ſuch means. With regard to the prohibition to the court of arches; although the plaintiff might have made his application ſooner to this court, I do not ſee why we ſhould not even now grant the prohibition. Coſts are merely incidental

to the original matter; and if we put a ſtop to the original ſuit, we muſt not do ſo to all the ſubſequent proceedings. And matter ſufficient appearing for this court to interfere and ouſt the eccleſiaſtical court of their juriſdiction, I am of opinion that a prohibition ſhould go to both of the courts.

Buller J. Before a party is entitled to a prohibition, it is incumbent on him to ſuggeſt what has been done in the court below. When that ſuggeſtion is entered on record, if it ſtates facts which are not true, the other party ſhould move to quaſh it: but if they are unimpeached, the court muſt take them to be true. Now this caſe ſtands thus; to a ſuit inſtituted in the eccleſiaſtical court, the party pleaded a *modus*, which covered the whole farm; he has pleaded it in terms that can admit of no doubt. And the only remaining queſtion muſt be as to the exiſtence in fact of the *modus* pleaded; and that it was ſo pleaded below is not contradicted. Then if we judge on theſe proceedings, they will not ſupport the arguments uſed by the counſel againſt the rules, that both the courts below held this plea to be bad in point of form; it is not ſufficient for them to ſay ſo, but they ſhould have ſhewn in what reſpect it was defective in form. It is not

ſtated for what reaſons the court below held the plea to be inſufficient; and as the plea is ſtated on the ſuggeſtion, it is right in point of form. Then it appears to us, that a *modus* was properly pleaded to the whole libel, which ouſts the eccleſiaſtical court of their juriſdiction; and that is the ground on which this court will grant a prohibition. It is not neceſſary for the party to apply in the firſt inſtance for a prohibition; if he make an application any time before ſentence, he is in time. The argument which the counſel againſt the rule have uſed, namely, that the only object of this application, is to prevent the defendant from recovering the coſts to which he is entitled under the ſentence of the court of arches, that argument is no objection to our granting the writ; that argument was much relied on in the caſe of *Whitford* v. *Wilſon*, where the parties had gone to a great length in the eccleſiaſtical court, before they applied to this court for a prohibition: but the court there ſaid, if the party came before ſentence, it was in time. As to the caſe in *Rolle's* Abridgement, wherein it was ſaid, that no prohibition lies, if there be a remedy by way of appeal, it relates only to thoſe caſes where the ſuit below was proper: therefore it is not applicable here, for this is a caſe, where, though the eccle-

26 G. B.R.

2 Rol. Abr. 319, n. 1.

ſiaſtical court had originally juriſdiction, yet when the *modus* was pleaded, they were ouſted of their juriſdiction. The prohibition is merely for the purpoſe of trying the *modus*; for the party applying muſt declare in prohibition, and if the jury find againſt the *modus*, I take it a conſultation goes of courſe. And then the eccleſiaſtical court will, perhaps, be juſtified in conſidering the coſts in all the ſtages of the proceeding. With reſpect to the other rule to the court of arches; the ſuggeſtion ſtates, that the proceedings are now depending in that court; for though a ſentence has been given, yet the coſts have not been paid, and they are now proceeding to compel the payment of the coſts. Then they are in fact proceeding in this ſuit. And therefore a prohibition muſt go to both the courts. Both rules were made abſolute, and the court ordered the plaintiffs to declare in prohibition. (Lord *Mansfield* and Mr. Juſtice *Willes* were not in court.)

It may here be proper to ſhew in what courts prohibitions may be obtained, and according to 4 *Inſt.* 81. the court of chancery may grant prohibitions at any time, either in term or vacation: Which writs of prohibition are not returnable: but

but if they be not obeyed, then may this court grant an attachment upon the prohibition, returnable either in the king's bench or common pleas.

And the ſame author treating of the court of common pleas, ſays, That they may, without any writ upon a ſuggeſtion, grant prohibitions to keep, as well temporal as eccleſiaſtical courts, within their bounds and juriſdiction, without any original or plea depending: for the common law, which in thoſe caſes is a prohibition of itſelf, ſtands inſtead of an original, whereof there be infinite precedents in this court. And it was ſo held by all the judges in *England*. And of the king's bench, Sir *Edward Coke* ſays, It granteth prohibitions to courts temporal and eccleſiaſtical, to keep them within their proper juriſdiction. 4 Inſt. 99. 4 Inſt 91.

In 2 *Inſt.* It is ſaid, that the form of prohibitions have not been, nor can be altered, except by parliament. And it is *contra coronam et dignitatem regiam*, for any to uſurp to deal in that, which they have not lawful warrant from the crown to deal in, or to take from the temporal juriſdiction that which belongeth to it. The prohibitions do not import, that the eccleſiaſtical courts are *aliud*, than the king's, or not the king's p. 602.

courts, but do import, that the caſe is drawn into *aliud examen*, then it ought to be: And therefore it is always ſaid in the prohibition (be the court temporal or eccleſiaſtical to which it is awarded) if they deal in any caſe which they have not power to hold plea of, that the cauſe is drawn *ad aliud examen*, than it ought to be, and therefore *contra coronam et dignitatem regiam*.

1 Salk. 33. In the caſe of *Clay* v. *Sudgrave*, it was held by *Holt*, chief juſtice, that prohibitions were not of right, but diſcretionary. He ſaid *Hale* and *Wyndham* were of that opinion, but *Kelynge* differed.

4 Burr. 1950. In the caſe of *Howe* v. *Nappier*, Lord *Mansfield* ſaid, "that a prohibition is *ex debito juſtitiæ*.

And it ſeems that the awarding or refuſing a prohibition is a diſcretionary act in the court; yet, it muſt be only underſtood that the ſuperior courts are at liberty, under the circumſtances of the caſe, to exerciſe a legal diſcretion in this point, but not an arbitrary one, in refuſing prohibitions where in ſuch like caſes they have been generally granted, or where by the laws and ſtatutes of the realm they were generally granted. And of this opinion were the chancellor and all

all the judges and barons of the exchequer in *England* in the reign of *James* the Firſt, as appears in 2 *Inſt.* 607.

When a prohibition is moved for, the method is for the party to file a ſuggeſtion in court, ſtating the proceedings that have been had in the court below, and then ſuggeſting the reaſon why he prays the prohibition; upon this the court grants a rule for the other party to ſhew cauſe why a writ of prohibition ſhould not iſſue; and if it appear to the court that ſurmiſe is not true, or not clearly ſufficient to ground the prohibition upon, they will deny it; otherwiſe, they will make the rule abſolute for the prohibition; and if the matter be doubtful, they will order the party to declare in prohibition.

When the court inclines to grant the motion for a prohibition, the defendant has a ſort of right to inſiſt that the plaintiff ſhall declare; but where the court inclines againſt the motion, the plaintiff has no ſuch right, for there might be judgment by default, and the court obliged to prohibit againſt their own opinion; and it is no injury to the plaintiff, as he may apply to another court.

It is very frequent where many things are in controverſy, to order the prohibition to ſtand as to one part, and a conſultation to the other part.

Where an iſſue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they ſhall give no more than one ſhilling damages, for it is in nature of an iſſue to inform the conſcience of the court; but after he has had judgment *quod ſtet prohibitio*, he may bring his action upon the caſe, and recover the damages he has ſuſtained.

B. N. P. 218. Note, where the party is ordered to declare in prohibition, he ought not to take out the writ, but ſerving the other ſide with a rule is ſufficient; and if in that ſuit he obtain judgment, the judgment is *ſtet prohibitio*, otherwiſe it is *quod eat conſultatio*; therefore, if the party be excommunicated, the mandatory part of the writ to abſoil the party is not to be obeyed till after trial had.

In the ſtatute of 2 *Edw.* 6. before recited, ſix months are allowed for the proof of the ſuggeſtion, and this ſhall be computed according to the calendar, for this being a computation which concerns the church,

church, it is but reaſonable that it ſhould be made conformably to the eccleſiaſtical law.

In the caſe of *Foy* v. *Liſter*, a prohibition had been granted, and the defendant applied for a conſultation, on the ground that the defendant had not proved his ſuggeſtion within ſix calendar months from the time prohibition was teſted, and the court doubting whether they could compute the vacation as any part of the time, conſidered of it, and afterwards granted the conſultation. And the court agreed that the ſtatute extends to ſmall as well as great Tithes, and that the ſix months are to be computed from the *teſte* of the writ, and the caſe in *Moore* 573, wherein it is ſaid there muſt be ſix months in term time, was denied. 2 Salk. 544. 2 Lord Raymond 1172. S. C.

And it was held in *Skinner*'s caſe, that if the ſuggeſtion be proved before one of the judges within the ſix months, it is well enough, although it may not be recorded till after the expiration of that time. Latch. 30. Litt. 155.

And, as before obſerved, the ſaid ſtatute requires the ſuggeſtion to be proved by two honeſt and ſufficient witneſſes: as in the caſe of *Brown* v. *Craſhaw*, where it appeared that the plaintiff in a prohibition, had proved 2 Bulſt. 154.

proved his ſuggeſtion by two perſons who had both been attainted of felony; the court thereupon awarded a conſultation.

4 Bac. Abr. 246. The chief intent of the ſtatute being to prevent frivolous and vexatious ſuits, it hath been held that perſons, ſuch as pariſhioners of the pariſh, *&c.* who may not be ſufficient witneſſes at a trial at law, may, notwithſtanding, be ſufficient witneſſes to prove the ſuggeſtion; and alſo, that after the admitting and recording the proof of the ſuggeſtion, nothing is to be objected againſt the perſons of the witneſſes, or againſt their evidence.

Litt. 155. In the caſe of *Steddar* v. *Tilar*, it was held, that if the plaintiff's proof of his ſuggeſtion be defective or inſufficient, he may ſupply it by better at any time within the ſix months, but not after.

1 Vent. 107. In *Robſon*'s caſe, it is ſaid to be ſufficient where the ſuggeſtion conſiſts of two parts, to produce one witneſs to each part.

Cro. Car. 208. Noy. 148. It is neceſſary in all caſes where the matter ſuggeſted is merely matter in fact, to prove the ſuggeſtion. It hath therefore been adjudged, that the ſuggeſtion of a

modus

modus decimandi ought to be proved within the time limited by the act.

As in the case of *Stroud* v. *Hoskins*, the suggestion stated that the suit in the spiritual court was for Tithes of heath and barren ground, within seven years after the improvement, and the court required proof of the suggestion. 1 Jon. 231. Cro. Car. 208. S. C.

In the case of *Bennett* v. *Snell*, it is laid down, that proof of a suggestion by hearsay is sufficient within the statute. And proof as the witness thinks or believes will serve. Palm. 377. Noy. 44.

And the general rule seems clearly laid down in the case of *Godfreye* v. *Llewellin*, wherein it was said by *Holt*, chief justice, "that where the matter suggested appears upon the face of the libel, we never insist upon an affidavit; but unless it appear upon the face of the libel to be out of their jurisdiction, you ought to have affidavit of the truth of your suggestion. 2 Salk. 549.

It is said the suggestion need not be precisely proved in order to obtain a prohibition. For where the suggestion was for a *modus* for lamb and wool, though the proof failed as to the wool, and it was urged Gibs. 1029.

urged therefore that the whole had failed, yet a prohibition was granted. And in the caſe of *Auſtin* and *Pigot*, it was ſaid that the proof in a prohibition need not be ſo preciſe, but if it appears that the court *Chriſtian* ought not to hold plea thereof, it ſufficeth.

1 Lord Ray. 587. But in the caſe of *Smith* v. *Wallet*, the ſequeſtrator of the Tithes of a vicarage ſued the impropriator in the ſpiritual court for Tithes upon the endowment. And the defendant moved here for a prohibition, upon a ſuggeſtion that it was not a vicarage, and that that ought to be tried at common law.

Holt, chief juſtice, ſaid, "that the ſuggeſtion is good in point of law; but if the ſuggeſtion appears to the court to be notoriouſly falſe, the king's bench will not grant a prohibition; for they ought to examine into the truth of the ſuggeſtion, and ſee what foundation it hath, for if it plainly appears to be falſe in point of fact, the king's bench ought not to grant a prohibition.

Hob. 66, 185. In the caſe of *Aſton* v. *Caſtle Birmidge*, it was held, that though the ſurmiſe be matter of fact, and triable by a jury, yet it

it is in the diſcretion of the court to deny a prohibition.

In the caſe of *Worts* v. *Clifton*, it was held that the plaintiff as well as defendant, in the ſpiritual court, may have a prohibition to ſtay his own ſuit. To this purpoſe, when Archbiſhop *Bancroft* alledged that the plaintiff's having made choice thereof, and brought his adverſary there into trial, ſhould by all intendment of law and reaſon, and by the uſage of all other judicial places, thereby conclude himſelf in that behalf; yet the anſwer of the judges was, "that none may purſue in the eccleſiaſtical court for that which the king's court ought to hold plea of; but upon information thereof given to the king's courts, either by the plaintiff or by any mere ſtranger, they are to be prohibited, becauſe they deal in that which appertaineth not unto their own juriſdiction. Cro. Jac. 350. 2 Inſt. 607.

If the ſuggeſtion be in the negative, as if the proprietor of a parſonage impropriate ſue for Tithes, and the cauſe of the ſuggeſtion be, that the parſonage is not impropriate; or if the parſon of *Dale* ſue for Tithes of lands in that pariſh, and the party ſue for a prohibition, for that the land lieth not in that pariſh, or that the parſon that 2 Inſt. 662.

ſued

ſued for Tithes, &c. was not inducted, &c. or any the like cauſe in the negative of any manner of fact, he ſhall not produce any witneſs by force of the ſtatute 2 *Edw.* 6. becauſe a negative cannot be proved; and therefore a prohibition upon cauſes in the negative remains at the common law.

Therefore no proof is requiſite where the ſuggeſtion is grounded upon any matter of law, becauſe matters of law are to be decided by the judges, and not proved by witneſſes. And matters of law likewiſe appear upon the face of the proceedings.

It is ſaid if the party who has obtained a writ of prohibition be ordered to declare in prohibition, that he is not obliged to make proof of his ſuggeſtion within ſix months purſuant to the 2 and 3 *Edw.* 6. becauſe the proof is in ſuch caſe to be made at the trial of the cauſe.

By the before in part recited ſtatute of 2 and 3 *Edw.* 6. *c.* 13. *ſ.* 14. it is enacted, "that the party ſhall recover double coſts "and damages againſt the party that ſo "purſued the prohibition, the ſaid coſts "and damages to be aſſigned or aſſeſſed "by the court where the ſaid conſultation "ſhall be ſo granted, for which coſts and damages

" damages the party to whom they ſhall be
" awarded, may have an action of debt by
" bill, plaint, or information in any of the
" king's courts of record, wherein the de-
" fendant ſhall not wage his or their law,
" nor have any eſſoign or protection allow-
" ed or admitted.

If a defendant in prohibition bring an action of debt for the recovery of the double coſts and damages given by the ſaid clauſe in 2 and 3 *Edw.* 6. where a conſultation is granted, for want of the ſuggeſtions being proved within ſix months, he ſhall have alſo the coſts in ſuch action. 1 Roll. Abr. 516. b. 37.

And Mr. *Hullock* in his law of coſts ſays, p. 315. " the 2 and 3 *Edw.* 6. *c.* 13. *ſ.* 14. gives coſts where the party applying for a prohibition fails in proving the truth of his ſuggeſtion within ſix months, and this continued to be the only caſe, where either a plaintiff or defendant in prohibition was entitled to recover any coſts until 8 and 9 *W.* 3. *c.* 11. (of which ſee more *infra.*)

It may now ſeem neceſſary to ſhew by whom and againſt whom ſuch actions for ſubtraction of Tithes under the *ſtatute* 2 and 3 *Edw.* 6. may be brought, and in what way ſuch actions are to be brought.

2 Inſt. 650. Moor 912. 13 Co. 48. Noy. 136. If an huſband be ſeiſed of Tithes in the right of his wife, or jointly with his wife, the huſband and wife muſt join in bringing the action upon the *ſtatute*, for the ſubſtraction of Tithes.

Roll. 1. Rep. 13. Yet in *Babiugton's* caſe, it ſeems to be admitted, that the action may be brought by the huſband alone without joining the wife with him.

Noy. 136. In the caſe of *Foord* v. *Pennoy*, it is ſaid, that if the huſband die, the wife and not the executor of the huſband ſhall bring the action.

Cro. Jac. 318. In the caſe of *Arnold* v. *Bidgood*, in debt upon the *ſtatute* of 2 *Ed.* 6. the caſe was, *A.* was poſſeſſed of Tithes *jure uxoris* as executor of her former huſband and granted *totum jus, titulum et intereſſe ſuum de et in decimis predictis*; reſolved unanimouſly that the grant was good, and the leaſe he had in the Tithes in right of his *feme* did thereby paſs, and judgment for the plaintiff.

Ley. 70. Jon. 325. Noy. 137. If the Tithes be once ſet out and ſevered from the nine parts, they then become lay chattel veſted in the huſband; therefore if after ſuch ſeverance they be taken away by a ſtranger, the huſband alone may bring an

an action for such taking away of his Tithes, without joining his wife with him.

But an action in such case lies not against the owner who set out the Tithes, and if it be, he may plead the special matter in bar of such action. Moor. 912. 3 Cro. 607. 4 Leon. 7.

But if after severance the owner of the corn himself, or any other by his command takes the Tithes away, the husband and wife in such case may join in an action upon the *stat.* 2 *Edw.* 6. against the owner for not setting out his Tithes, notwithing that they were once severed by him from the nine parts, for that such severance is to be looked upon as fraudulent, only to evade the law.

Mr. *Watson* says, "It seems to me that the husband in this case hath an election either to charge the owner of the corn in an action of trespass at common law, to be brought by himself alone for taking away his Tithes after they were severed, or in an action upon the statute, to be brought by himself and his wife, for taking away the corn, the Tithes not being set out, even as before the statute, in such case the party grieved might either have brought an action of trespass at common law, or have Watf. c. 58.

commenced a ſuit for the Tithes in the eccleſiaſtical court. But *quere*, if there be not a difference when the Tithes are immediately taken away by the owner of the corn after they are ſevered, and when they are ſuffered to contiue for ſome time upon the land after ſuch ſeverance."

Noy. 136. In the caſe of *Ford* v. *Pomroy*, it was adjudged that if a pariſhioner ſets forth his Tithes, and preſently takes them away again, debt lies for treble damages upon ſuch a fraudulent ſetting forth, though the ſtatute ſpeaks nothing of the fraud.

If one be poſſeſſed of Tithes by ſeveral titles, as where part of them belong to the parſon, and part to the vicar, who ſeverally make leaſes of their parts to one perſon, 2 Cro. 68. ſuch leſſee may bring one action for the ſubtraction of theſe Tithes.

1 Vent. 126. 2 Keb. 756. 2 Lev. 2. S. C. In the caſe of *Pellow* v. *Kingsford*, the lands out of which the Tithes were demanded were in ſeveral pariſhes, yet it was determined that one action may be brought for the ſubtraction of them; and the plaintiff need not ſet forth how much of the land is in one pariſh, and how much in the other, the action being in the nature of

of an action of treſpaſs, grounded upon the wrong, in not obſerving this ſtatute.

But it was determined in *Cane* v. *Pill*, Stiles 229. that if the plaintiff only ſay that the Tithes belonged to him, and ſets not forth in what pariſh the land lie, out of which the Tithes are demanded, this is nought if the defendant *demur* to the declaration; but if it go to trial, and a verdict be found for the plaintiff, this omiſſion of the pariſh is helped by the verdict.

Debt upon the *ſtat.* 2 *Edw.* 6. for Tithes, and declared that he is rector of the churches of *Dale* and *Sale*, and the defendant occupied four hundred acres of land in *D.* and *S.* ſowed them, and took away the corn not Tithed; after verdict for the plaintiff, it was moved in arreſt of judgment, that he ſhould have ſhewn what part of the lands were in *Dale*, and what part in *Sale*, ſo that the defendant might know how to anſwer particularly to each ſeverally, and perhaps he has good title to one church and not to the other; but *per Hale*, chief juſtice, and *cur.* it is good, for the action is in nature of a treſpaſs founded on the tort, and the exception diſallowed, and judgment given for the plaintiff. 2 Lev. 1.

Styles 103, 108.

In the caſe of *Southcott* v. *Southcott*, debt upon the ſtatute for not ſetting out Tithes after verdict, it was moved that the declaration was too general and uncertain, it being for ſuch a quantity of grain, but did not ſhew what ſort of grain, and ſo it may be for grain not Tithable, for the word grain comprehends rape ſeed, cole-ſeed, &c. but adjudged that the declaration was good, for it was for grain growing in ſuch a field, and the word grain in common underſtanding is taken for corn.

In debt upon the *ſtatute Edw.* 6. for Tithes, the plaintiff declared that he was rector of *M. A.* and by reaſon thereof ought to have the Tithes of one hundred acres of land in that pariſh, and of eighty acres of land in the pariſh of *M. G.* without ſhewing how he was entitled to the Tithes of the lands out of his pariſh.

The court held this to be well enough after a verdict; beſides, that a general allegation without ſhewing a title is well enough in this action. Another exception was, that the plaintiff did not alledge that the defendant was *ſubditus domini regis*, as the ſtatute requires; *ſed non allocatur*, becauſe it is alledged that he was *occupator terræ*,

terræ, which implies that he was *ſubditus*. *Phillips* v. *Kettle*. *Hard.* 173. *In. Scace.*

A tenant in common of Tithes brought debt, and declared for the 20th part of the Tithes. Exception was taken that the Tithe is but the 10th part; but *per Wyndham*, "though it be improper to the ſignification of the word, yet one may declare for the 20th part of the Tithe, or the 15th part of them; for the calling them Tithes is only to ſhew and deſcribe the nature of the thing demanded." *Cole* v. *Banbury*. *Sed.* 49.

In *Champernoon* v. *Hill*, debt upon the *ſtatute* 2 *Edw.* 6. for not ſetting forth of Tithes; plaintiff declared upon two leaſes, one of the parſon, who had two parts, and another of the vicar, who had a third part. The defendant pleaded not guilty, which was found againſt him. It was moved in arreſt of judgment, that not guilty was no good plea, but *nil debet*; but adjudged well enough. Then it was moved that the plaintiff ought to have brought ſeveral actions, his title being by ſeveral demiſes; *ſed allocatur*; for that the ſuit was for the tort as well as upon the title; ſo judgment was for treble damages. Mo. 914. pl. 1293.

An action of debt was brought upon this ſtatute by *G.* againſt two tenants in common, and it appeared that one of them ſet out his Tithe, and that the other took and carried it away; and adjudged that the action lies only againſt him who carried it away. Sir *John Gerrard*'s caſe. *Hutt.* 122.

Hutt. 121. In the caſe of *Cole* v. *Wilkes* a leaſe was made to two, they enter and occupy, and ſet not out their Tithes, debt was brought againſt one of them, it lies not; but here it was found, that one only occupied the land.

Sid. 88. Debt for not ſetting out of Tithes lies for executor of parſon, but not againſt executor of the pariſhioner.

Sid. 181. pl. 20. In the caſe of *Weekes* v. *Truſſell*, a ſuit was in the eccleſiaſtical court for double damages upon 2 *Edw.* 6. for not ſetting out of Tithes, pending which ſuit defendant dies, and then they ſue the executors for double damages; it was inſiſted for a prohibition, that this was a perſonal offence and tort of the teſtator, for which by the commoh law the executors ſhall not anſwer.

In

In Juſtice *Moreton*'s caſe, *M.* brought debt, as executor, upon 2 *Edw.* 6. for not ſetting forth Tithes due to his teſtator. It was inſiſted that this action, though for a forfeiture for a tort done to the teſtator, was maintainable within the equity of the *ſtatute* 4. *Edw.* 3. that gives the executor treſpaſs *de bonis, aſportatis in vita teſtatoris*; and the court were clear of opinion for the plaintiff, and ſaid that it had been formerly reſolved ſo in the exchequer chamber. Vent. 30.

In debt on the *ſtat.* 2 and 3 *Edw.* 6. for not ſetting out Tithes, the declaration recited the ſtatute as made *Nov.* 2, *anno.* 2 and 3 *Edw.* 6. whereas it could not be in two years of the ſaid king, and therefore after verdict judgment was arreſted. In the caſe of *Langley* v. *Haynes*, *Mo.* 302.

If the plaintiff declares in debt for not ſetting forth Tithes, as of a leaſe made to him for twenty years where it was but for ten years, this is good, for it is not material in this caſe how he doth declare, ſo as Tithe is to be paid him out of the land. 2 Bulſt. 86.

As to the word proprietor in the ſtatute, if a rectory be leaſed for years, the leſſee may well ſay *poſſeſſionatus fuit*, though he can reap no profits before the harveſt, and 2 Bulſt. 67.

the

the ſhewing the leaſe, and the pleading that by force thereof he was poſſeſſed and ſo continued, is clearly good.

Cro. Jac. 498. In *Pemberton* v. *Shelton*:—the plaintiff in his declaration (in an action in debt upon the ſtatute of 2 *Edw.* 6.) demanded more than the treble value did amount unto, and did not ſhew ſatisfaction for the reſt; but all the court held it good enough, for there is a difference when an action is grounded upon a ſpecialty or a contract, which is a ſum certain, or upon a ſtatute which gives a certain ſum for a penalty, for there he may not vary from the ſpecialty. But when the demand is of no ſum certain, but only ſo much as ſhall be given by a jury, although he varies from the firſt valuation it is not material, for he ſhall not recover according to his demand in his declaration, but according to the verdict; judgment for the plaintiff.

Carth. 304. *Alſton* and others v. *Buſcough*:---an action of debt upon the *ſtat.* 2 *Edw.* 6. wherein the plaintiff demanded the treble value, *&c.* Upon *nil debet* pleaded, the plaintiff had a verdict in common pleas. And upon a writ of error brought in *B. R.* it was very much inſiſted on that the declaration was ill, becauſe the plaintiffs had only alledged that

that the defendant had carried away the corn without ſetting out the Tithes, but did not aver that the defendant had not made any agreement with them for Tithes, the ſtatute gives the penalty where the Tithes are carried off without any agreement made for ſo doing; therefore if the defendant had agreed with the plaintiffs for carrying off the corn without ſetting out the Tithes (as it does not appear but he might) then it had been no forfeiture; and the court was of that opinion: *viz.* that the declaration was ill for the reaſon *ſupra*, if it had been upon a demurer; but this was helped by the verdict, for if there had been any agreement proved at the trial, the plaintiff could not have obtained a verdict.

To an action of debt on the ſtatute, defendant pleaded not guilty, and held well enough the action of debt being founded on the ſtatute for a wrong done, and debt lies on it, though a certain penalty is not given thereby, but the treble value, which is uncertain. Cro. E. 621.

And in *Wortley* v. *Kerpingham*, it was reſolved that the plea of not guilty was well enough; for it is not for a *non feaſance*, but for a *mal feaſance* where the wrong is ſuppoſed. Cro. E. 766.

In

Hob. 218. In *Bawtry* v. *Iſted*, debt upon the *ſtatute* 2. *Edw.* 6. for not ſetting out Tithes, defendant pleaded *nil debet*, and this was adjudged a good iſſue.

B. N. P. 188. The plaintiff muſt in this action prove himſelf entitled to the Tithe, the taking away by the defendant, and the value; but as the action is founded on the tort, the plaintiff may declare as *firmarius vel proprietarius* without ſhewing any particular title.

The plaintiff declared as a farmer of the rectory of *Friburſt*, and proved himſelf leſſee of one *Bellow*, who was leſſee to the dean and chapter to whom the rectory belonged, and produced the leaſe from *Bellow*, but not from the dean and chapter to him; however, upon proving that he received Tithe of others as farmer, it was holden ſufficient by *Pemberton*, chief juſtice in *Suſſex*, 1682; and at the ſame aſſizes, the plaintiff being farmer under the dean and chapter of *Canterbury*, and proving he had received Tithes for ſome years as ſuch, it was holden ſufficient without producing any leaſe.

Ibid.

If the plaintiff claim as parſon, if the Tithe be not in queſtion, it is ſufficient if

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he prove himſelf in quiet poſſeſſion; but if the Tithe be in queſtion, he muſt prove his ordination by the biſhop, his inſtitution and induction, ſubſcription to the declaration in the act of uniformity in the preſence of the biſhop, *&c.* and his reading the thirty-nine articles within two months, and declaring his aſſent to them.

In debt upon the ſtatute againſt three, upon *nil debet* pleaded, the jury found that the defendant *Hancock debet* 18*l.* but *quoad* the other defendants *nil debent*; and upon motion in arreſt of judgment, becauſe it is an action founded on a contract which is entire; the court held it was founded on a tort, and therefore one may be found guilty and the other acquitted, as in other actions upon torts; and upon the authority of this caſe the court of king's bench determined the caſe of *Hardman* v. *Whitacre* and others, which was an action of debt againſt nine, for keeping a lurcher contrary to 8 *Geo.* 1. *c.* 19. All pleaded *nil debent*, and verdict as to ſix *quod debent* 5*l.* and as to the three others, *nil debent*. Only one penalty can be recovered againſt all. B. N. P. 189.

Upon *nil debet* a lay perſon cannot give a *non decimando* in evidence, but the king or a ſpiritual perſon may, without ſhewing any cauſe Ibid.

cauſe why diſcharged; for it ſhall be intended by lawful means.

1 Brownl. 65. 70. If the action be brought for predial Tithes, for which an action lies upon the ſtatute, and alſo for ſmall or other Tithes for which no action lies upon the ſtatute, and the plaintiff obtains a verdict for the whole, yet he ſhall not have judgment upon ſhewing this matter to the court, for that the plaintiff ought not to recover in an action upon the ſtatute for any other Tithes but predial Tithes only.

By the 7 and 8. *W.* 3. *c.* 6. "For the "more ſpeedy, eaſy, and effectual recovery "of ſmall Tithes, and the value of them "where the ſame ſhall be unduly ſub-"tracted and detained, where the ſame do "not amount to above the yearly value of "40*s.* from any one perſon, it is enacted "that all perſons ſhall well and truly ſet "out and pay all and ſingular the Tithes, "commonly called ſmall Tithes, and com-"poſitions and agreements for the ſame, "with all offerings, oblations, and obven-"tions, to the ſeveral rectors, vicars, and "other perſons to whom they ſhall be due "in their ſeveral pariſhes, according to "the rights, cuſtoms, and preſcriptions "commonly uſed within the ſaid pariſhes reſpectively;

" reſpectively; and if any perſon ſhall ſub-
" tract or withdraw, or any ways fail in the
" true payment of ſuch ſmall Tithes, offer-
" ings, oblations, obventions, or compoſi-
" tions, by the ſpace of twenty days at
" moſt after demand thereof, it ſhall be
" lawful for the perſon to whom the ſame
" ſhall be due, to make his complaint in
" writing to two or more juſtices of the
" peace within that county, place, or
" diviſion where the ſame ſhall grow due,
" neither of which juſtices is to be patron
" of the church or chapel whence the ſaid
" Tithes ſhall ariſe, nor any ways intereſted
" in ſuch Tithes, offerings, oblations, ob-
" ventions, or compoſitions aforeſaid.

" And on ſuch complaint ſo made to
" two or more juſtices of the peace, as
" aforeſaid, the ſaid juſtices are to ſummon
" in writing, under their hands and ſeals,
" by reaſonable warning, every ſuch per-
" ſon againſt whom ſuch complaint ſhall
" be made; and after his appearance, or
" upon default of appearance, the ſaid
" warning or ſummons being proved before
" them upon oath, the ſaid juſtices ſhall
" proceed to examine and determine the
" ſaid complaint, and upon the proofs,
" evidences, and teſtimonies produced be-
" fore them, ſhall in writing under their
" hand

" hand and ſeals, adjudge the caſe, and
" give ſuch reaſonable allowance and com-
" penſation for ſuch Tithes, oblations, and
" compoſitions ſo ſubtracted or withheld
" as they ſhall judge to be juſt and reaſon-
" able, and alſo ſuch coſts and charges not
" exceeding ten ſhillings, as upon the
" merits of the cauſe ſhall appear juſt and
" reaſonable.

" And if any perſon ſhall refuſe or neg-
" lect, for the ſpace of ten days after notice
" given, to pay or ſatisfy any ſuch ſum of
" money as upon ſuch complaint and pro-
" ceeding ſhall by two ſuch juſtices be ad-
" judged as aforeſaid; in every ſuch caſe
" the conſtables and churchwardens of the
" ſaid pariſh, or one of them, ſhall by war
" rant under the hands and ſeals of the ſaid
" juſtices to them directed, diſtrain the
" goods and chattels of the party ſo
" refuſing or neglecting as aforeſaid; and
" after detaining them for the ſpace of three
" days, in caſe the ſaid ſum ſo adjudged,
" together with reaſonable charges of mak-
" ing and detaining the ſaid diſtreſs, be not
" tended or paid by the ſaid party in the
" mean time, ſhall make public ſale there-
" of, and pay to the party complaining ſo
" much of the money ariſing by ſuch ſale
" as may ſatisfy the ſaid ſum ſo adjudged,
" retaining

Altered by 27 G. 2. which ſee *infra*.

" retaining to themſelves ſuch reaſonable
" charges for making and keeping the
" ſaid diſtreſs as the ſaid juſtice ſhall See 27 G. 2. *infra.*
" think fit.

" That the ſaid juſtices in their examin-
" ation of matters within this act, ſhall
" have power to adminiſter an oath or
" oaths.

" Provided that this act ſhall not extend
" to any Tithes, oblations, payments, or
" obventions, within the city of *London* or
" liberties thereof, nor to any other city or
" town corporate where the ſame are ſettled
" by act of parliament.

" And that no complaint ſhall be heard
" and determined by the ſaid juſtices, un-
" leſs the complaint ſhall be made within
" two years next after the time that the
" ſame Tithes, oblations, obventions, and
" compoſitions did become due.

" Provided alſo that any perſon finding
" himſelf aggrieved by any judgment to
" be given by ſuch two juſtices, may ap-
" peal to the next general quarter ſeſſions
" to be held for that county or other divi-
" ſion; and the juſtices there ſhall proceed
" finally to hear and determine the matter,

" and to reverſe the ſaid judgment if they " ſhall ſee cauſe; and if they ſhall find " cauſe to confirm the ſaid judgment, they " ſhall decree the ſame by order of ſeſſions, " and ſhall alſo proceed to give ſuch coſts " againſt the appellant, to be levied by " diſtreſs and ſale of the goods and chattels " of the ſaid appellant, as to them ſhall " ſeem juſt and reaſonable. And no pro- " ceedings or judgment had by virtue of " this act ſhall be removed or ſuperſeded " by any writ of *certiorari*, or other writs " out of his majeſty's courts at *Weſtminſter*, " or any other court, unleſs the title of ſuch " Tithes, oblations, or obventions ſhall be " in queſtion.

" Provided, *&c.* that where any perſon " complained of for ſubtracting or with- " holding any ſmall Tithes or other duties " aforeſaid, ſhall before the juſtices to " whom ſuch complaint is made, inſiſt " upon any preſcription, compoſition, or " *modus decimandi*, agreement or title, " whereby he ought to be freed from pay- " ment of the ſaid Tithes, or other dues " in queſtion, and deliver the ſame in " writing to the ſaid juſtices ſubſcribed by " him; and ſhall then give to the party " complaining reaſonable and ſufficient ſe- " curity to the ſatisfaction of the ſaid juſ-

" tices,

" tices, to pay all ſuch coſts and damages,
" as upon a trial at law, to be had for that
" purpoſe in any of his majeſty's courts
" having cognizance of that matter, ſhall
" be given againſt him, in caſe the ſaid
" preſcription, compoſition, or *modus deci-*
" *mandi* ſhall not upon the ſaid trial be
" allowed; in that caſe the ſaid juſtices
" ſhall forbear to give any judgment in
" the matter, and then, and in ſuch caſe,
" the party complaining ſhall be at liberty
" to proſecute ſuch perſon for his ſaid ſub-
" traction, in any other court where he
" might have ſued before the making of
" this act.

" That every perſon who ſhall by virtue
" of this act obtain any judgment, or
" againſt whom any judgment ſhall be
" obtained, before any juſtices of the peace
" out of ſeſſions for ſmall Tithes, obla-
" tions, obventions, or compoſitions, ſhall
" cauſe or procure the ſaid judgment to
" be enrolled at the next general quar-
" ter ſeſſion to be held for the ſaid county
" or other diviſion; and the clerk of the
" peace ſhall upon the tender thereof en-
" roll the ſame, and ſhall not receive for
" the enrollment of any one judgment any
" fee or reward exceeding one ſhilling,
" and the judgment ſo enrolled, and ſatis-

" faction made by paying the ſum ad-
" judged, ſhall be a good bar to conclude
" the ſaid rectors, vicars, and other perſons
" from any other remedy for the ſaid ſmall
" Tithes, oblations, obventions, or com-
" poſitions, for which the ſaid judgment
" was obtained.

" And if any perſon againſt whom ſuch
" judgment ſhall be had, ſhall remove out
" of the county, or other diviſion, before
" the levying of the ſum adjudged; the
" juſtices who made the judgment, or one
" of them, ſhall certify the ſame under
" hand and ſeal to any juſtice of ſuch
" other county or place wherein the ſaid
" perſon ſhall be an inhabitant; who ſhall
" by warrant under his hand and ſeal, to be
" directed to the churchwardens or conſta-
" bles of the place, or one of them, levy
" the ſum ſo adjudged to be levied upon
" the goods and chattels of ſuch perſon, as
" fully as the ſaid other juſtices might
" have done if he had not removed as
" aforeſaid.

" And the juſtices who ſhall hear and
" determine any of the matters aforeſaid,
" ſhall have power to give coſts, not ex-
" ceeding ten ſhillings, to the party pro-
" ſecuted, if they ſhall find the complaint

" to be falſe and vexatious, to be levied in " manner and form aforeſaid.

" And if any perſon ſhall be ſued for any " thing done in the execution of this act, " and the plaintiff in ſuch ſuit ſhall diſ- " continue his action, or be *non* ſuit, or a " verdict paſs againſt him, ſuch perſon ſhall " recover double coſts.

" Provided that any clerk, or other per- " ſon, who ſhall begin any ſuit for re- " covery of ſmall Tithes, oblations, or " obventions, not exceeding the value of " forty ſhillings, in his majeſty's court of " exchequer, or in any of the eccleſiaſtical " courts, ſhall have no benefit by this act " for the ſame matter for which he hath " ſo ſued."

By the 7th and 8th *W.* 3. *c.* 34. *ſ.* 3. it is enacted, " That if any *Quaker* making " ſuch ſolemn affirmation or declaration, " ſhall be lawfully convicted, wilfully, " falſly, and corruptly to have affirmed " or declared any matter or thing, which " if the ſame had been in the uſual form " would have amounted to wilful and cor- " rupt perjury, every *Quaker* ſo offending " ſhall incur the ſame penalties and for- " feitures as by the laws and ſtatutes of

"realm are enacted againſt perſons con-
"victed of wilful and corrupt perjury.

"And whereas, by reaſon of a pretend-
"ed ſcruple of conſcience, *Quakers* do re-
"fuſe to pay Tithes and church rates, be
"it enacted by the authority aforeſaid, that
"where any *Quaker* ſhall refuſe to pay or
"compound for his great or ſmall Tithes,
"or to pay any church rates, it ſhall and
"may be lawful to and for the two next
"juſtices of the peace of the ſame county
"(other than ſuch juſtice of the peace as
"is patron of the church or chapel whence
"the ſaid Tithes do or ſhall ariſe, or any
"ways intereſted in the ſaid Tithes) upon
"the complaint of any parſon, vicar,
"farmer, or proprietor of Tithes, church-
"warden or churchwardens, who ought to
"have, receive, or collect the ſame, by
"warrant under their hands and ſeals, to
"convene before them ſuch *Quaker* or
"*Quakers* neglecting or refuſing to pay
"or compound for the ſame, and to exa-
"mine upon oath, which oath the ſaid
"juſtices are hereby impowered to ad-
"miniſter, or in ſuch manner as by this
"act is provided, the truth and juſtice of
"the ſaid complaint, and to aſcertain and
"ſtate what is due and payable by ſuch
"*Quaker* or *Quakers* to the party or parties
"complaining

" complaining, and by order under their
" hands and ſeals to direct and appoint
" the payment thereof, ſo as the ſum or-
" dered, as aforeſaid, do not exceed ten
" pounds; and upon refuſal by ſuch
" *Quaker* or *Quakers* to pay according to
" ſuch order, it ſhall and may be lawful
" to and for any one of the ſaid juſtices,
" by warrant under his hand and ſeal, to
" levy the money thereby ordered to be
" paid by diſtreſs and ſale of the goods of
" ſuch offender, his executors or admini-
" ſtrators, rendering only the overplus to
" him, her, or them, neceſſary charges of
" diſtraining being thereout firſt deducted
" and allowed by the ſaid juſtice; and any
" perſon finding him, her, or themſelves
" aggrieved by any judgment given by
" ſuch two juſtices of the peace, ſhall and
" may appeal to the next general quarter
" ſeſſions to be held for the county, riding,
" city, liberty, or town corporate; and the
" juſtices of the peace there preſent, or the
" major part of them, ſhall proceed finally
" to hear and determine the matter, and to
" reverſe the ſaid judgment if they ſhall
" ſee cauſe; and if the juſtices then pre-
" ſent, or the major part of them, ſhall find
" cauſe to continue the judgment given
" by the firſt two juſtices of the peace,
" they ſhall then decree the ſame by order

" of ſeſſions, and ſhall alſo proceed to give " ſuch coſts againſt the appellant, to be " levied by diſtreſs and ſale of the goods " and chattels of the ſaid appellant, as to " them ſhall ſeem juſt and reaſonable; " and no proceedings or judgment had, or " to be had, by virtue of this act, ſhall be " removed or ſuperſeded by any writ of " *certiorari*, or other writ, out of his ma- " jeſty's courts at *Weſtminſter*, or any other " court whatſoever, unleſs the title of ſuch " Tithes ſhall be in queſtion.

" Provided that in caſe any ſuch appeal " be made as aforeſaid, no warrant of diſ- " treſs ſhall be granted until after ſuch " appeal be determined. And provided " alſo, that this act ſhall continue in force " for the ſpace of ſeven years, and from " thence to the end of the next ſeſſion of " parliament, and no longer."

p. 301. Mr. *Burn*, in the fourth volume of his Juſtice of Peace, ſays that it ſeemeth beſt not to make out, at leaſt not to execute the warrant of diſtreſs under this act until after the next ſeſſions.

In this ſtatute there is no time limited for delivering the diſtreſs, nor charges al-

lowed for the keeping it, ſo that it may be ſold immediately.

By *ſtatute* 13. *W.* 3. *c.* 4. the ſaid act was further continued for eleven years, and thence to the end of the next ſeſſion of parliament, and by a ſubſequent act it is made perpetual.

And the ſame act was likewiſe more fully enforced and extended by another act, made 1. *G* 1. *c.* 6. which in the ſecond ſection thereof enacts:

"That the remedy provided by the ſaid "act 7 and 8. *W.* 3. for the recovery of "Tithes and church rates, ſhall be ex- "tended and may be uſed againſt any "*Quaker* for the recovering of any Tithes "or rates, or any cuſtomary or other rights, "dues, or payments belonging to any "church or chapel, which of right by law "and cuſtom ought to be paid for the "ſtipend or maintenance of any miniſter "or curate officiating in any church or "chapel; and any two or more juſtices of "the peace of the ſame county or place "(other than ſuch juſtice as is patron of "any church or chapel, or any ways in- "tereſted in the ſaid Tithes) upon com- "plaint of any parſon, vicar, curate,

"farmer,

"farmer, or proprietor of ſuch Tithes, or "any church-warden or chapel-warden, or "other perſon who ought to have, receive, "or collect any ſuch Tithes, rates, dues, "or payments, as aforeſaid, are authoriſed "and required to ſummon in writing under "their hands and ſeals, by reaſonable warn-"ing, ſuch *Quaker* or *Quakers* againſt "whom ſuch complaint ſhall be made, "and after his or their appearance, or upon "default of appearance, the ſaid warning "or ſummons being proved before them "upon oath, to proceed to hear and de-"termine the ſaid complaint, and to make "ſuch order therein as in the aforeſaid act "is limited; and alſo to order ſuch coſts "and charges as they ſhall think reaſonable, "not exceeding ten ſhillings, as upon the "merits of the cauſe ſhall appear juſt; "which order ſhall and may be ſo exe-"cuted, and on ſuch appeal may be re-"verſed or affirmed by the general quarter "ſeſſions, with ſuch coſts and remedy for "the ſame; and ſhall not be removed in-"to any other court unleſs the titles of "ſuch Tithes, dues, or payments ſhall be "in queſtion, in like manner as by the "aforeſaid act is limited and appointed."

The *ſtatute* 27. *G.* 2. *c.* 20. directs in what manner the diſtreſſes ſhall be made by the

the juſtices of peace, &c. and with power to the juſtices to order the goods diſtrained to be kept for not leſs than four days, nor more than eight, and gives power to the officers making the diſtreſs to deduct their reaſonable charges of felling the ſaid diſtreſs, and it is provided that the ſame ſhall not extend to alter any proviſions relating to diſtreſſes to be made for the payment of Tithes and church rates by the people called *Quakers*; contained in the acts of the 7 and 8 *W.* 3. *c.* 34. and the 1 *Geo.* 1. *ſt.* 2. *c.* 6.

In the caſe of the *King* v. *Wakefield et al.* an order of two juſtices was made upon ſeveral *Quakers*, for payment of Tithes under the value of ten pounds to the curate of a chapel, and confirmed upon appeal at the ſeſſions. 1 Burr. 485.

And upon application to have the original order quaſhed (the counſel for the plaintiff having abandoned the order of ſeſſions) four exceptions were taken to it; theſe exceptions were as follows:

"Firſt, It is a joint order made on different perſons, for diſtinct *non* payments of different

different Tithes, whereas there ought to have been a diſtinct order on each.

Second, The title is in queſtion, therefore the juſtices have no juriſdiction. The exception in the act of 1. *G.* 1. *ſt.* 2. c. 6. *ſ.* 2. is, "unleſs the titles of ſuch dues, "Tithes, or payments ſhall be in queſ-"tion." And theſe words, "unleſs, *&c.*" extends to this whole clauſe, and are not confined to the granting a *certiorari* only. And this fact of the title being in queſtion appeared, as was alledged by the counſel, upon the granting the *certiorari* in the preſent caſe.

Third, *Non conſtat*, that the two juſtices who made this original order are "neither "patrons, nor intereſted in the Tithes," but 1. *Geo.* 1. *c.* 6. *ſ.* 2. requires they ſhall be neither one nor the other. Now they ought expreſsly to aver and ſhew (negatively) that they are not, or elſe they have no juriſdiction, by the very words of the act; the juriſdiction being given "to any "two or more juſtices, *&c.* other than "ſuch as, *&c.*"

Fourth, It does not ſufficiently aſcertain and ſtate what is due and payable by the defendants; or, at leaſt, for what the reſpective

ſpective ſums are due, one ſum is one ſhilling and ſixpence being due to the curate; not ſaying for what. Another is being the value of their cuſtomary payments. Another is four ſhillings being ancient cuſtomary payments.

This order was made on the act of 1 *G.* 1. *St.* 2. *c.* 6. *ſ.* 2. which extends the 7 and 8. *W.* 3. *c.* 34. *ſ.* 4. to all payments to miniſters, or curates officiating in churches or chapels.

Lord *Mansfield*, delivered the opinion of the court.

He began with ſtating the two acts of 7 and 8 *W.* 3. *c.* 34. and 1 *G.* 1. *St.* 2. *c.* 6. *ſ.* 2. The former relates only to great and ſmall Tithes and church rates; and is temporary, the latter makes it perpetual and extends it to any Tithes or rates &c. And both acts direct; "that the proceedings ſhall not be "removed into any other court, unleſs the "title be in queſtion." It is upon the laſt act that the preſent order was made. A *certiorari* has iſſued to remove the order into this court; and it came on upon exceptions to the order. Both ſides made very material objections; one ſide, to the order, for that the juſtices had no juriſdiction, becauſe the

title

title was in queſtion: the other, to the *certiorari*, for that no *certiorari* could iſſue by the expreſs proviſion of the act, to remove the proceedings from before the juſtices into any other court, becauſe the title was not in queſtion.

The act was made in favour to and for the eaſe and benefit of Quakers, and to ſave them from troubleſome and expenſive proſecutions; but it never meant that a mere ſcruple of theirs, or an obſtinate withholding of the Tithes, ſhould be any hindrance to the matter's being determined by the juſtices of peace. This would have fruſtrated the very intention of the act: which meant to give this juriſdicton to the juſtices in that very caſe; were the real right and title to them ſhould not be in diſpute between the parties. His Lordſhip then directed the affidavits on which the *certiorari* was granted to be read. It was therein ſworn on the part of the defendants:

That the defendants controverted the title to the Tithes, before the juſtices, and alſo that the title to the Tithes was then and at the time of making the ſaid affidavit really in diſpute. The juſtices had notice to ſhew cauſe againſt the *certiorari*. On ſhewing cauſe,

cauſe, five old inhabitants of the chapelry ſwear by their affidavits:

That ſuch cuſtomary ſtipends or payments have always been paid to the curate by the landholders, without any ſort of ſcruple or objection except lately by the Quakers; and no other perſons diſpute it. And theſe five perſons alſo ſwear: That they believe them to be due; and that the former owners of of thoſe very lands (which had been purchaſed about four years ago, by theſe Quakers) did pay for them as other perſons did, in the ſaid chapelry; and theſe Quakers prchuaſe the lands ſubject to ſuch payments. Theſe are the affidavits upon which the *certiorari* was granted.

Now if this general allegation of the Quakers controverting the title, and the conſequential aſſertion that the title was in queſtion (without any further particulars, or ſhewing upon what foot they controverted the payment) ſhould be eſteemed a ſufficient ground for removing the orders; it would put a total end to theſe acts of Parliament and evade the very deſign and intention of making them, for the Quakers might pretend that they are obliged in conſcience to refuſe or controvert the payment of theſe demands and conſequently to queſtion and deny

deny the right to receive them. Now that is the very thing the acts meant to provide a ſummary remedy for. The intention was that in ſuch caſe the juſtices ſhould make an order to compel them to pay. Their affidavits are general that they controverted the title; and that it was really in queſtion. Whereas by the affidavits made by the old inhabitants, it is very plain that the former owners of thoſe very lands have always paid; and that theſe quakers, who are the ſubject of this order have no pretence to diſpute it, upon any other foot than their own general ſcruple to pay any demands of this nature: which theſe acts are, for their own eaſe and advantage calculated to compel them to do, in a method the moſt gentle and convenient for themſelves (who ſcruple to pay without compulſion).

We are all of opinion as to the merits of the caſe, that the title is not ſo controverted or ſo in queſtion, as that the juſtices can be precluded from juriſdiction, or their order be regularly and properly removed into any other court. And that the rule for the *certiorari* having been made abſolute and the return thereto having been filed, ought not now to ſtand in the way, and prevent our coming at the real juſtice and merits of the caſe. For if the *certiorari* iſſued *im-*

provide, we order it to be ſuperſeded, and the return to be taken off the file."

And the court ordered that the writ of *certiorari* be ſuperſeded *(quia improvide emanavit)* the return taken off the file, and the order remanded.

His lordſhip added this hint to be obſerved in future caſes of this ſort, *viz.* "That upon all orders of this kind, the great and material point muſt be,

"Whether the title to the Tithes was really in queſtion or not, and ought to be determined before the *certiorari* iſſues?

Note, in this caſe the ſeveral caſes following were cited: 1 *Stra.* 471. *Rex* v. *Furneſs.* 1 *Stra.* 264. *Rex* v. *Elizabeth Nicholls*, *E.* 18. *G.* 2. *B. R. Rex* v. *Govers*, *E.* 28. *G.* 2. *B. R.*

The 2 and 3. *Edw.* 6. *c.* 13. *ſ.* 14. gives coſts (as before obſerved) where the party applying for a prohibition fails in proving the truth of his ſuggeſtion within ſix months, and this continued to be the only caſe where either the plaintiff or defendant in prohibition was entitled to recover any coſts until the 8 and 9. *W.* 3. *c.* 11. *ſ.* 3. entitled

"An act for the better preventing frivolous and vexatious suits;" and it is enacted

"That in all actions of waſte, and actions of debt upon the ſtatute for not "ſetting forth Tithes, wherein the ſingle "value or damage found by the jury ſhall "not exceed the ſum of twenty nobles, "and in all ſuits upon any writs of *ſcire* "*facias*, and ſuits upon prohibitions, the "plaintiff's obtaining judgment or any "award of execution after plea pleaded or "demurrer joined therein, ſhall recover "likewiſe his coſts of ſuit, and if the "plaintiff ſhall become *non* ſuit, or ſuffer "a diſcontinuance, or a verdict ſhall paſs "againſt him, the defendant ſhall recover "his coſts, and have execution for the "ſame in like manner as aforeſaid: *i. e.* by "*capias ad ſatisfaciendum*, *fieri facias*, or "*elegit*."

A doubt has ariſen upon this act, whether the coſts payable by the defendant (the plaintiff having obtained judgment in prohibition) ſhould be computed from the firſt motion, or only from the declaration?

2. N. P. 331. Hull. La. coſts, 316. In the caſe of *Wills* v. *Turner*, in prohibition, a motion was made that the prothonotary

thonotary ſhould not allow coſts, except from the time of the delivery of the declaration, the court unanimouſly declared that the plaintiff ought to have his coſts from the time of the ſuggeſtion, and of the ſuggeſtion itſelf, and coſts incident and ſubſequent thereto.

The court, after judgment for the plaintiff in the caſe of Sir *Henry Houghton* v. *Starkey*, were of opinion that the coſts ought to be allowed from the time of the firſt motion, and directed all the officers for the future to allow the coſts of the firſt motion. Stra. 82.

And in *Swetnam* v. *Archer*'s caſe, it was ſtated in the ſame manner, and agreed to be the uniform practice ever ſince. Ibid.

In Sir *Thomas Bury* v. *Croſs*, the ſame doubt was raiſed by a new maſter, and the court ordered coſts from the orginal motion. Stra. 83.

In the caſe of *Middleton* and *Croft*, the plaintiff in prohibition having prevailed in one point, although he failed in all the reſt, moved for coſts, and it was moved that they might be taxed from the time of the Stra. 1062.

first motion, according to several determinations.

And this last was acquiesced in if the court should be of opinion for costs; as to which it was objected, that the point in which the plaintiff prevailed was not the gist of the proceedings, but only a circumstance; and that it would be very hard that they who had prevailed upon the merits should pay costs.

But by the court, the words of the act are not to be got over, which gives costs to the plaintiff if he obtains any judgment. And this matter was under consideration in the *house of lords* in Dr. *Bentley*'s case, where the prohibition stood as to some articles, and there was a consultation for the rest: "To be sure it will be considered in the *quantum*, but we cannot deny costs."

4 Bro. Parl. ca. 66.

In Dr. *Bentley* and the Bishop of *Ely*'s case, and in the argument of this case the whole court were clearly of opinion, that where a prohibition goes to part, and a consultation to the other part, the plaintiff in prohibition is entitled to costs. And Lord *Hardwicke*, then chief justice, observed that this case was within the very words of the statute of 8 and 9 *W. 3. c.* 11. *s.* 13, which are,

are, "if the plaintiff obtain judgment, or "any award of execution after plea plead-"ed, or demurrer joined," and the ſtatute only provided for the defendants recovering his coſts in ſuch ſuits where the plaintiff ſhould become *non* ſuit, ſuffer a diſcontinuance, or a verdict paſs againſt him, neither of which was the caſe here. And as to the *quantum* of the coſts, that though it was an equitable conſtruction of the ſtatute to give coſts from the firſt motion, yet where a conſultation was awarded as to part, it was in the diſcretion of the court, upon the circumſtances of the caſe, whether they would allow coſts from that time or not.

In the caſe of *Gegge* v. *Jones*, upon ſhewing cauſe againſt a prohibition, the court made the rule abſolute, with a direction that the plaintiff ſhould declare in prohibition. Stra. 1114.

Plaintiff tendered a declaration, but defendant refuſed it, and applied to ſtay proceedings, as being unwilling to ſubmit. The other inſiſted he had a right to go on, and ſo get the coſts of the motion, which he could not otherwiſe have.

But the court ſtayed the proceedings without coſts; ſaying the direction to declare was in favour of the defendant, who might wave it.

But if defendant in prohibition compels the plaintiff to declare, and then pleads a nugatory plea, the court will, on motion, order him to pay the coſts to the plaintiff.

Barnes 148. Hull. L. coſts 323.

As in the caſe of *Seed* v. *Woolfenden*: at the defendant's inſtance it was made part of the rule for a prohibition, that the plaintiffs ſhould declare in prohibition. The defendants afterwards demanded a declaration, and threatened a *non pros* for want thereof.

The plaintiff's agent prepared a declaration, but when it was ready he was told by the defendant's agent that he need not deliver it; however, having been at the trouble and expence of preparing it, he delivered it, and demanded a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the ſpiritual court after the prohibition, gave a rule to reply, and demanded a replication.

Upon which the plaintiff obtained a rule for the defendant to ſhew cauſe why he ſhould

ſhould not pay plaintiff the coſts of the proceedings in prohibition, The rule was now made abſolute.

The court looked upon the plea to be a ſham nugatory plea, not being to the merits of the cauſe; the allegation that the defendant has proceeded contrary to the prohibition is, and muſt be put into every declaration of this kind; but whether he has ſo proceeded or not, is totally immaterial.

A plaintiff in prohibition is entitled to coſts, by the ſtatutes of 8 and 9. *W.* 3. *c.* 11. only where he obtains judgment after the plea pleaded or demurrer joined; but if there be judgment by default in a ſuit in prohibition, and the plaintiff have damages upon a writ of inquiry, for the contempt in proceeding after the writ of prohibition, he will be entitled to coſts by virtue of the ſtatute of *Glouceſter*, *c.* 1.

And in the caſe of Sir *E. Bettinſon* v. Dr. *Hinchman*, upon a motion to ſet aſide a writ of inquiry of damages in prohibition after judgment by default, upon which the jury had found damages for the plaintiff, it was alledged on the part of the plaintiff that the citing him to appear in the ſpiritual court, in a plea of which that court

B. N. P. 331 Hull. l. coſts, 319. Bettinſon *v.* Savage. Com. 355.

has no cognizance, and whereby the plaintiff may sustain great damage, is a contempt of the laws of the land, and therefore the defendant ought to make the plaintiff satisfaction for the damage sustained by the proceedings in the court below; and this the defendant tacitly admits, by suffering judgment to go against him by default. And if the plaintiff be entitled to damages, he is also to costs, under the statute of *Glouceſter*, c. 1.

The court inclined to be of this opinion, but took further time to consider of the matter. On a subsequent day the question was solemnly argued; after which the court gave the plaintiff leave to proceed on his enquiry, and directed the prothonotary to tax his costs. But because in this case the defendant was prosecuted for a contempt at common law, as judge of the spiritual court, he could not possibly be in contempt until the rule was made absolute to stay his proceedings; the costs were allowed only from the time that the rule for the prohibition was made absolute.

Cæ. Pr. C. B. 157. Pract. Reg. 118.

If in a suit in prohibition the plaintiff be obliged to declare as administrator (as, if the prohibition be granted to a suit in the spiritual court against the plaintiff as administrator,

miniſtrator, for Tithes due in the inteſtate's life time) and become *non* ſuit at the trial, he is not liable to the payment of coſts.

A defendant in prohibition, in caſe of the *non* ſuit of plaintiff, is not entitled to the coſts occaſioned by oppoſing the rule for the prohibition, but merely to the coſts of the *non* ſuit; as was determined in the caſe of

Carliſle v. *Meyrick*, upon a rule to ſhew cauſe why the prothonotary ſhould not review his taxation of coſts, it appeared that the plaintiff in a ſuit in prohibition had been *non* ſuited; upon which the queſtion was, whether the defendant ought to have the coſts incurred by oppoſing the rule to ſhew cauſe why the writ of prohibition ſhould not be granted, as well as the coſts of the *non* ſuit? It was determined that he ought to have no more than the coſts of the *non* ſuit. If the defendant had ſucceeded in his oppoſition to the rule to ſhew cauſe why the prohibition ſhould not be granted, it would even then have been for the conſideration of the court, whether upon all the circumſtances of the caſe, that rule ſhould be diſcharged with coſts, but as he did not ſucceed in that oppoſition, it muſt now be intended that it was groundleſs,

H. 17. G. 3. Say on coſts, 137. Hull. l. coſts, 317.

leſs, and conſequently there is no pretence for his being allowed the coſts thereof.

Bar. 138. In the caſe of *Malton* v. *Acklam*, it hath been determined, that a defendant in a ſuit in prohibition is entitled to coſts where a verdict is found for him, though it be for part only of the matter in iſſue.

The ſeveral branches of the law, whereby the right of Tithes and other eccleſiaſtical duties are guided and directed, have been in this and the preceding parts of this book fully conſidered; the ſeveral ſtatutes whereby any proviſion is made directive of thoſe rights or remedies, have been alſo ſhewn and explained, and how and in what manner they are to be ſued for or defended.

It remains only that ſomething ſhould be ſaid of the manner of Tithing in the city of *London*, there being *proviſoes* in the ſeveral ſtatutes of the 27. *H.* 8. *c.* 20. 32. *H.* 8. *c.* 7. 2 and 3. *Edw.* 6. *c.* 13. and 7 and 8. *W.* 3. *c.* 6. that nothing therein ſhall extend to the city of *London*, concerning any Tithe, offering, or other eccleſiaſtical duty, grown due to be paid within the ſaid city. I ſhall therefore only add a diſtinct chapter touching the manner of Tithing in the ſaid city.

CHAP.

CHAP. X.

TITHES IN LONDON.

Of the ancient Cuſtom, or Modus, of Tithing in London, and in what manner it varied until ſettled by Stat. 37 *H.* 8. *c.* 11. *and the Decree therein recited, the Stat.* 22 *and* 23. *Ca.* 2. *c.* 15. *together with a liſt of thoſe pariſhes burnt by the Fire in* 1666. *regulated by the ſaid Statute, and in what caſes the parties may apply to the Lord Chancellor, &c. for Warrants of Diſtreſs, &c.*

IT clearly appears from our ancient records, hiſtories &c. that the Legiſlative Power of this kingdom had always a peculiar care to preſerve the priviledges, cuſtoms and uſages of the city and citizens of London, more eſpecially their *modus decimando*, or cuſtom of Tithing; and indeed no further proof of this is requiſite than the proviſoes made in the ſeveral acts paſſed relative to the payment of Tithes; that they ſhall

ſhall not be conſtrued to extend to the city of or citizens of London.

The ancient cuſtoms of the city will beſt appear from the caſe of *Dunn* v. *Burrell* and *Goff*, which as reported in *privilegia Londini*, *p.* 93. &c. was thus, viz.

Mr. *Dunn*, parſon of *Grace-church* in London, had exhibited a petition to the then Lord *Mayor* according to the cuſtom of the ſaid city, againſt the defendants and others his pariſhioners, for a ſum of money paid by them in lieu of Tithes due to him from them as inhabitants within his pariſh, but ſuit being by the defendants then made to the then Lord *Chancellor Bacon*, he repreſented the matter to the King, who thereupon commiſſioned the Archbiſhop of *Canterbury*, the ſaid Lord *Chancellor*, and divers other peers, and judges, to hear the cauſe. And thereupon as to the point, what was anciently paid by the citizens of *London* for Tithes, and how thoſe payments grew, and became varied; it was ſaid:

That *Niger* Biſhop of *London*, 13 *H.* 3. made a conſtitution in confirmation of an ancient cuſtom formerly uſed time out of mind, that proviſion ſhould be made for the miniſters of *London* in this way, that is to

ſay,

ſay, that he which payeth the rent of twenty ſhillings for his houſe wherein he dwelt, ſhould offer every Sunday and every apoſtle's day, whereof the evening was faſted, one halfpenny: and he that paid but ten ſhillings rent yearly, ſhould offer but one farthing; and all this amounted unto according to the proportion of two ſhillings and ſixpence in the pound, for there were 52 Sundays, and but eight apoſtles days the vigils whereof were faſted, and if it chanced that one of the apoſtles days fell upon a Sunday, then there was but one halfpenny, or farthing paid; ſo that ſometimes it fell out to be ſomewhat leſs than two ſhillings and ſix-pence in the pound.

And it appeareth by our book caſes in *Edward* the Third's reign, that the proviſions made for the miniſters of *London*, was by offerings and obventions; howſoever the particulars are not deſigned there but muſt be underſtood according to the former ordinance made by *Niger*; and thus the payment of 2s. 6d. in the pound continued until 13 *Rich.* 2.

Thomas Arundell, Archbiſhop of *Canterbury*, made an explanation of the conſtitution made by *Niger*, and thruſt upon the citizens of *London* two and twenty other

Saints

Saints days, than were meant by the conſtitution made by *Niger*, whereby the offerings then amounted into the ſum of three ſhillings and five pence in the pound; and there being ſome reluctation made by the citizens of *London* againſt it, pope *Innocent* in the 5 *H.* 4. granted his bull, whereby the former explanation was confirmed; which confirmation (notwithſtanding the difference between the clergy and citizens of *London* about thoſe two and twenty Saints days which were added unto their number) Pope *Nicholas* by his bull in 31 *H.* 6. confirmed.

Againſt which the citizens of *London* did alſo contend, and that with ſo high a hand, that they cauſed a record to be made, whereby it might appear in future ages that the order of explanation, made by the Archbiſhop of *Canterbury*, was done without calling the citizens of *London* unto it, or any conſent given by them; and it was branded by them with the name of an "Order "ſurreptitiously and abruptitiouſly gotten "and therefore more fit to have the name "of a deſtructory than a declaratory "order!

But notwithſtanding this contention, it ſeems the power and intereſt of the clergy was then ſo great, that the payment was then

then moſt uſually made according to the rate of 3*s.* 5*d.* in the pound.

For *Lindwood*, who writ in the time of *H.* 4. in his provincial conſtitutions debating the queſtion whether the merchants and artificers of the city of *London* ought to pay any Tithes? ſheweth, that the citizens of *London*, by an ancient ordinance obſerved in the ſaid city, are bound every Lord's day and every principal feaſt day, either of the apoſtles or others whoſe vigils are faſted, to pay one farthing for every ten ſhillings rent that they paid for their houſes wherein they dwelt.

And in 36. *H.* 6. there was a compoſition made between the citizens of *London* and the miniſters of *London*, that a payment ſhould be made by the citizens according unto the rate of 3*s.* 5*d.* in the pound; and if any houſe were kept in the proper hand of the owner, or were demiſed without reſervation of any rent, then the churchwardens of the pariſh where the houſes were, ſhould ſet down a rate of the houſes, and according to that rate, payment ſhould be made.

After which compoſition ſo made, there was an act of common council made,

14. *Edw.*

14. *Edw.* 4. in *London*, for the confirmation of the bull granted by Pope *Nicholas*.

But the citizens of *London* finding that by the common laws of the realm no bull of the pope, nor arbitrary compoſition, nor act of common council, could bind them in ſuch things as concerned their inheritance, they ſtill wreſtled with the clergy, and could not condeſcend unto the payment of the ſaid eleven pence by the year, obtruded upon them by the addition of the two and twenty Saints days.

Whereupon there was a ſubmiſſion unto the lord chancellor, and divers others of the privy council, in the time of *H.* 8. and they made an order for the payment of Tithes according to the rate of 2*s.* 9*d.* in the pound; the which order was firſt promulgated by a proclamation made, and afterwards eſtabliſhed by an act of parliament made 27. *H.* 8. *c.* 21.

In confirmation of which ſaid order there was a decree made 37. *H.* 8. with ſome further additions to it; the which ſaid decree was confirmed by an act of parliament made 37. *H.* 8. *c.* 12. So, as it appeareth by that which hath been ſaid, that the firſt payment was only according unto the rate of

of 2*s.* 6*d.* per pound; afterwards the payment increaſed to the rate of 3*s.* 5*d.* per pound.

And laſtly, there was an abatement and payment made only according to the rate of 2*s.* 9*d.* in the pound.

The firſt payment grew by cuſtom, the ſecond by conſtitutions and bulls of the pope; the laſt by decree in the chancery, which decree, by the act, ought to have been enrolled in chancery in ſix months, but ſearch hath been made, and it is not found.

And as to the laſt point, which was, who ſhall be judge of the payment of Tithes for houſes in *London*, and the remedy for the recovery of them? It was ſaid to be apparent out of the words of the decree, that the mayor of the city of *London* is judge, and is to give order concerning them; and ſuit is not to be made in the eccleſiaſtical court for them; and if it be, a prohibition is to be granted, inſomuch that the party grieved reſorteth unto another judge than the ſtatute hath appointed. But if the mayor do not give aid as is fitting, then reſort is to be made unto the

lord chancellor of *England*, who hath three months given him for ending of the ſaid cauſe.

One material part of the argument was, whether by the common law any thing can be demanded for the houſes in *London?* And it was argued to be clear that nothing can be demanded of common right. For that which the parſon ought to demand of houſes is Tithes; and it is improper, and cannot be, that Tithes can be paid of houſes. Firſt, in regard that houſes do not increaſe and renew, but rather decreaſe for want of reparations, and Tithes are not to be paid of any thing but ſuch things as do increaſe and renew, as it appeareth by the Levitical law and the common law of the land. Secondly, houſes are matters of inheritance, whereof a *precipe* lieth at the common law; and the rent reſerved upon a leaſe made of them, is likewiſe knit into the inheritance, and parcel of it, ſo that it ſhall go along unto him that hath the inheritance, and therefore ſhall deſcend unto the heir. And it is a rule in law, that Tithes are not to be paid of part of the inheritance, but they ought to be paid of ſuch things as renew, or grow out of the inheritance; upon which reaſon it is that Tithes, by the common law of the land, are

are not to be paid of ſlate, ſtone, and coal digged out of the pit. Thirdly, houſes being built only for the receiving, habitation, and dwelling of men, and for conveniency of protection againſt the ſcorching heats in ſummer, and tempeſtuous ſtorms in winter, without any profit at all redounding unto the owner; and the parſon being to have a benefit otherwiſe, in the payment of perſonal Tithes, ariſing through his trade and induſtry in the houſe, no Tithes can be demanded for the houſes themſelves, or for the rent reſerved upon them. Fourthly, the decree made 37. *H.* 8. which exempteth the houſes of noblemen from the payment of any rate Tithes, ſheweth the common law to be ſo, that houſes of themſelves are to be diſcharged of the payment of Tithes; and accordingly it hath been adjudged in divers caſes happening at the common law, that Tithes by the courſe of the common laws may not be demanded for houſes, but they are to be diſcharged therefrom.

And as to the point, which was, whether cuſtom can eſtabliſh a right of payment of any thing unto the parſon for houſes? It ſeemed clear that it well might, for it may well be that before ſuch time as any houſe was built on the ground where the houſe is, there had been a ſum of money paid for

the profits of the ground, in the name of a *modus decimandi*; and though the houſe was after built on the ground, yet the *modus* continues. And there being a continuance of the *modus* after the building of the houſe, time has made it to be a payment for the houſe; but this payment is to be termed a *modus decimandi*, and cannot well be called a Tithe paid for houſes, becauſe, as it is formerly ſaid, Tithes may not be paid for houſes. This appears in Dr. *Grant*'s caſe, which was in effect as follows:

11 Co. 16.
2 Inſt. 659.

Dr. *Grant*, parſon of the pariſh of *St. Leonard*'s, in *Foſter-lane, infra præcinctum St. Martini le Grand*, libelled in the ſpiritual court againſt *Edward Taylor*, farmer or tenant of an ancient houſe, called the *Dean*'s *Houſe*, within the ſaid precinct, late parcel of the poſſeſſions of the Abbot of *Weſtminſter*; and alledged that every pariſhioner or inhabitant having or occupying a manſion-houſe, ſhop, warehouſe, cellar, or ſtable, within the ſaid pariſh of *Saint Leonard*'s, in the precinct aforeſaid, had paid every year, by quarterly payments, at *Eaſter*, *Chriſtmas*, *St. John*, and *Michaelmas*, time out of mind, or at leaſt from the foundation, donation, and erection of the ſaid rectory of *St. Leonard*'s by equal portions,

tions, to the parſon of the ſaid rectory for the time being, *Nomine et loco decimarum ſuarum, juxta ratam cujuslibet viginti ſolidorum redditus per annum, ex qualibet hujusmodi domo, ſhopa, ſollar, ſellar, ſive, ſtabulo, ſic tent, ſive occupat in prædict' parochia duos ſolidos legalis moneta Angliæ, &c.* That the ſaid *E. T.* and his family did dwell in the ſaid houſe three years, and had poſſeſſed the ſame for the ſaid time, *ſub annuali reddita ſexdecim librarum ſeu ſaltem duodecim librarum, &c.*; and ſo demanded 2*s.* in the pound, *&c.* Thereupon the ſaid *E. Taylor* ſuggeſted for a prohibition, that the late Abbot of *Weſtminſter* and all his predeceſſors, till the diſſolution of the ſaid monaſtery, which was *anno* 30. *H.* 8. had held the ſaid houſe diſcharged of Tithes, and ſet forth the *ſtat.* 31. *H.* 8. and conveyed to himſelf a leaſe for years, *&c.* and thereupon had a prohibition granted by the court. To which Dr. *Grant* appearing, *Taylor* declared againſt him to the effect afforeſaid, and the Doctor traverſed the preſcription of diſcharge of Tithes, and the iſſue was tried in *London*, and found for the Doctor. But it was moved by *Taylor's* counſel, that upon the ſaid libel no conſultation ought to be granted, for of common right no Tirhes ought to be paid of houſes of habitation, nor for any rent reſerved

upon a leaſe of them; for Tithes ought to be paid of things which grow and renew year by year by the act of God. And not for dwelling-houſes, or for rents reſerved and created merely by the act of the party; and therefore, in the city, the parſons have 2*s.* 8*d.* in the pound in the name of Tithes; but this is by a decree made 1535, which is confirmed by authority of parliament *anno* 37. *H.* 8. *c.* 12. But *St. Martin's le Grand* is not within the ſaid decree and act; for though it is within *London*, yet it is not of it, and therefore it remains at common law, as 5. *E.* 4, 15. 30. *E.* 3. 1. and 38. *E.* 3, 13. It is ſaid by *Hinchden*, that the profits of the churches in *London* are the oblations and obventions paid by cuſtom; but it was reſolved by the whole court that a conſultation ſhould be granted; for it may have a lawful beginning, for it may be, that for all the land upon which the houſes are built, this *modus decimandi* hath time out of mind been paid; and although the ſame land be after built on, that ſhall not take away the parſon's right to the *modus*; for it might have a lawful beginning, and the ſame hath been uſed time out of mind. It was alſo reſolved, that for this cuſtomary payment of monies (the place being no part of *London*) the parſon might ſue in the eccleſiaſtical court, be-

cauſe

caſe it is in the name of Tithes, *viz.* a *modus decimandi*; and every ancient city and borough hath for the moſt part ſuch a cuſtom *de modo decimandi* for their houſes, for the maintenance of their parſons; and as to the opinions of 30. *E.* 3. and 38. *E.* 3. it was ſaid, that *obventio dicitur ab oveniendo*, and includes oblations, rents, and other revenues.

After the caſe of Dr. *Grant*, Dr. *Layfield*, parſon of *St. Clement*'s, without *Temple-Bar*, (which is alſo out of *London* and the liberties thereof) ſued for the Tithes of certain ſtables, and libelled that by common right and preſcription, time out of mind, the parſons there uſed to have a *modus decimandi* for the houſes, ſtables, and buildings: that is to ſay, after the rate of the tenth part of the yearly rent, or the value of the ſame, and upon ſhewing this to the court of *B. R.* a prohibition was granted; and the caſe being after moved for the defendant, though the ſaid caſe of Dr. *Grant* was urged, yet it was ordered by the court that the plaintiff in prohibition ſhould declare thereupon, and ſo bring the matter to be judicially determined by the court.

Hob. 11. Cro. 139. 1 Keb. 602. 2 Keb. 280. 3 Lev. 386.

The ſaid act of 37. *H.* 8. *c.* 12. is as follows:

" Where of late time contention, ſtrife, " and variance hath riſen and grown with- " in the city of *London*, and the liberties of " the ſame, between the parſons, vicars, " and curates of the ſaid city, and the " citizens and inhabitants of the ſame, for " and concerning the payment of Tithes, " oblations, and other duties within the " ſaid city and liberties, for appeaſing " whereof a certain order and decree was " made thereof, by the moſt reverend fa- " ther in God *Thomas*, archbiſhop of *Can-* " *terbury*, metropolitan and chief primate " of all *England*, *Thomas Audley*, knight, " Lord *Audley* of *Walden*, and then Lord " Chancellor of *England*, and now de- " ceaſed, and other of the king's moſt " honourable privy council; and alſo the " king's letters patents and proclamation " was made thereof, and directed to the " ſaid citizens concerning the ſame.— " Whereupon it was after enacted in par- " liament, holden at *Weſtminſter* by pro- " rogation the 4th day of *February*, in the " 27th year of the king's majeſty's moſt " noble reign, by authority of the ſame " parliament, that the citizens and in- " habitants of the ſame city ſhould at

" *Eaſter*

" *Eaſter* then next coming, pay unto the " curates of the ſaid city and ſuburbs, all " ſuch and like ſums of money for Tithes, " oblations, and other duties as the ſaid " citizens and inhabitants, by the order of " the ſaid late lord chancellor, and other " the king's moſt honourable council, and " the king's ſaid proclamation, paid, or " ought to have paid, by force and virtue " of the ſaid order, at *Eaſter*, which was in " the year of our Lord 1535; and the " ſame payments ſo to continue from time " to time until ſuch time as any other order " or law ſhould be made, publiſhed, rati- " fied, and confirmed by the king's high- " neſs, and the thirty-two perſons by his " grace to be named, as well for the full " eſtabliſhment concerning the payment of " all Tithes, oblations, and other duties " of the inhabitants within the ſaid city, " ſuburbs, and liberties of the ſame, as for " the making of the other eccleſiaſtical " laws of this realm of *England*, and that " every perſon denying to pay as is afore- " ſaid, ſhould by the commandment of the " Mayor of *London* for the time being be " committed to priſon, there to remain " until ſuch time as he or they ſhould have " agreed with the curate or curates for " their ſaid Tithes, oblations, and other " duties, as is aforeſaid, as in the ſaid act

" more

" more plainly appears. Sithen which act
" divers variances, contentions, and ſtriſes
" are newly riſen and grown between the
" ſaid parſons, vicars, and curates, and the
" ſaid citizens and inhabitants touching the
" payment of the Tithes, oblations, and
" other duties, by reaſon of certain words
" and terms ſpecified in the ſaid order,
" which are not ſo plainly and fully ſet
" forth as is thought convenient and meet
" to be; for appeaſing whereof, as well
" the ſaid parſons, vicars, and curates as
" the ſaid citizens and inhabitants, have
" compromitted and put themſelves to
" ſtand to ſuch order and decree touching
" the premiſes, as ſhall be made by the
" ſaid right reverend father in God *Thomas*
" archbiſhop of *Canterbury*, metropolitan
" and primate of *England*, the right ho-
" nourable Sir *Thomas Wryotheſly*, knight,
" Lord *Wryotheſly*, and Lord Chancellor of
" *England*, and the ſeveral other perſons
" thereunder mentioned, for a final end
" and concluſion to be had and made
" touching the premiſes for ever, and to
" the intent to have a full peace and per-
" fect end between the ſaid parties, their
" heirs and ſucceſſors, touching the ſaid
" Tithes, oblations, and other duties for
" ever:

" Be

" Be it enacted, by the authority of this " preſent parliament, that ſuch end, order, " and direction, as ſhall be made, decreed, " and concluded by the fore-named arch- " biſhop, lords, and knights, or any ſix of " them, before the firſt day of *March* next " enſuing, of, for, and concerning the pay- " ments of the Tithes, oblations, and other " duties within the ſaid city and the liber- " ties of the ſame, and enrolled in the " king's high court of chancery of record, " ſhall ſtand, remain, and be as an act of " parliament, and ſhall bind as well all " citizens and inhabitants of the ſaid city " and liberties for the time being as the " ſaid parſons, vicars, curates, and their " ſucceſſors for ever, according to the " effect, purport, and intent of the ſaid " order and decree ſo to be made and " enrolled; and that every perſon deny- " ing to pay any of his or their Tithes, " oblations, or other duties, contrary to " the ſaid decree to be made, ſhall by the " commandment of the Mayor of *London*, " for the time being, and in his default or " negligence by the Lord Chancellor of " *England*, be committed to priſon, there " to remain till ſuch time as he or they " have agreed with the curate or curates " for his or their ſaid Tithes, oblations, " or other duties as is aforeſaid."

The

The decree made under the authority of the ſaid act is as follows, *viz.*

" As touching the payment of Tithes in the city of *London*, and the liberties of the ſame, it is fully ordered and decreed by the moſt reverend father in God, *Thomas*, archbiſhop of *Canterbury*, primate and metropolitan of *England*, *Thomas*, Lord *Wryotheſly*, Lord Chancellor of *England*, *William*, Lord *St. John*, preſident of the king's majeſty's council and lord great maſter of his highneſs's houſhold, *John*, Lord *Ruſſell*, lord privy ſeal, *Edward*, Earl of *Hertford*, lord great chamberlain of *England*, *John*, Viſcount *Liſle*, high admiral of *England*, *Richard Liſter*, knight, chief juſtice of *England*, and *Roger Cholmly*, knight, chief baron of his grace's exchequer, this preſent 24th day of *February*, *anno domini ſecundum curſum et computationem Eccleſiæ Anglicanæ*, *miliſimo quingenteſimo quadrageſimo quint*, according to the ſtatute in ſuch caſe lately provided, that the citizens and inhabitants of the ſaid city of *London*, and liberties of the ſame for the time being, ſhall yearly, without fraud or covin, for ever pay their Tithes to the parſons, vicars, and curates of the ſaid city, and their ſucceſſors for the time being, after the rate hereafter following: that is to *wit*, of every ten ſhillings

rent

rent by the year, of all and every houſe or houſes, ſhops, warehouſes, cellars, ſtables, and many of them, within the ſaid city and liberty of the ſame ſixteen-pence ob. and of every twenty-ſhilling rent by the year of all and every ſuch houſe and houſes, ſhops, warehouſes, cellars and ſtables, and every of them, within the ſaid city and liberties two-ſhillings and nine-pence, and ſo above the rent of twenty-ſhillings by the year, aſcending from ten-ſhillings, to eighteen according to the rate aforeſaid.

Item; That where any leaſe is or ſhall be made of any dwelling houſe, or houſes, ſhops warehouſes, cellars, or ſtables, or any of them, by fraud or covin, reſerving leſs rent than hath been or is accuſtomed; or where any ſuch leaſe ſhall be made without any rent reſerved upon the ſame, by reaſon of any fine or income paid before-hand, or by any other fraud or covin, that then in every ſuch caſe, the tenant, or farmer, tenants, or farmers, thereof ſhall pay for his or their Tithes of the ſame, after the rate aforeſaid, according to the quality of ſuch rent or rents, as the ſame houſe or houſes, ſhops, warehouſes, cellars, or ſtables, or any of them, were laſt letten for without fraud or covin, before the making of ſuch leaſe.

Item;

Item; That every owner or owners, inheritor or inheritors, of any dwelling houſe or houſes, ſhops, warehouſes, cellars or ſtables, or any of them within the ſaid city and liberties, inhabiting or occupying the ſame himſelf or themſelves, ſhall pay after ſuch rate or Tithes as is aboveſaid, after the quantity of ſuch yearly rent as the ſame was laſt letten for without fraud or covin.

Item; If any perſon or perſons have taken, or hereafter ſhall take any meaſe or manſion place by leaſe, and the taker or takers thereof, his or their executors, or aſſigns, doth or ſhall inhabit in any part thereof, and have or hath within eight years laſt paſt, before this order, or after will or ſhall let out the reſidue of the ſame, that then in ſuch caſe the principal farmer or farmers, or firſt taker or takers thereof, his or their executors or aſſigns, ſhall pay his or their Tithes, after the rate aboveſaid, according to the quantity of their rent by year.

And if that any perſon or perſons have taken, or ſhall take divers Manſion-houſes, ſhops, warehouſes, cellars or ſtables, in one leaſe, and letteth, or ſhall let out one or more of the ſaid houſes, and keepeth or ſhall keep one or more in his or their own hands, and inhabiteth or inhabiting the ſame, that then

then the ſaid taker or takers, and his or their executors or aſſigns ſhall pay his or their Tithes after the rate aboveſaid; according to the quantity of the yearly rent of ſuch manſion houſe or houſes, retained in his or their hands; and that his aſſigns or aſſignees of the reſidue of the ſaid manſion houſe or houſes, ſhall pay his or their Tithes after the rate aboveſaid, according to the quantity of their yearly rents.

Item; If ſuch farmer or farmers, or his or their aſſigns, of any manſion-houſe, or houſes, warehouſes, ſhops, cellars, or ſtables, hath at any time within eight years laſt paſt, or ſhall hereafter let over all the ſaid manſion houſe or houſes contained in his or their leaſe to one perſon, or to divers perſons, that then the inhabitants leſſees, or occupiers of them and every of them, ſhall pay their tithes after the rate of ſuch rents, as the inhabitants leſſees or occupiers, and their aſſignee or aſſignees have been, or ſhall be charged withal, without fraud or covin.

Item; If any dwelling houſe within eight years laſt paſt, was or hereafter ſhall be converted into a warehouſe, ſtorehouſe, or ſuch like within the ſaid eight years, was, or hereafter ſhall be converted into a dwelling-houſe

houſe, that then the occupiers thereof ſhall pay Tithes for the ſame, after the rate above declared of manſion-houſe rents.

Item; That where any perſon ſhall demiſe any dye-houſe, or brewhouſe, with implements convenient and neceſſary for dying or brewing, reſerving a rent upon the ſame as well in reſpect of ſuch implements, as in reſpect of ſuch dye-houſe or brew-houſe, then the tenant ſhall pay his Tithes after ſuch rate as is aboveſaid, the third penny abated; and that every principal houſe or houſes, with key, or wharf, having any crane or gibbet belonging to the ſame, ſhall pay after the like rates as is aforeſaid, the third penny abated; and that the wharfs belonging to houſes, having no crane or gibbet ſhall pay for his Tithes, as ſhall be paid for manſion houſe in form aforeſaid.

Item, That where any manſion houſe with a ſhop, ſtable, warehouſe, wharf, with crane, timber yard, tinter yard, or garden belonging to the ſame, or as parcel of the ſame, is or ſhall be occupied together, that if the ſame be hereafter ſevered or divided, or at any time within eight years laſt paſt were ſevered or divided, that then the farmer or farmers, occupier or occupiers thereof, ſhall pay ſuch Tithes as is aboveſaid for ſuch

ſhops,

ſhops, ſtables, warehouſes, wharf with crane, timber yard, teinter yard, or garden aforeſaid, ſo ſevered or divided, after the rate of their ſeveral rents thereupon reſerved.

Item, That the ſaid citizens and inhabitants ſhall pay their Tithes quarterly, that is to ſay, at the *Feaſts of Eaſter*, the *Nativity of Saint John the Baptiſt*, *Saint Michael the Archangel*, and the *Nativity of our Lord*, by even portions.

Item, That every houſeholder paying ten ſhillings rent or above, ſhall for him, or herſelf, be diſcharged of their four offering days, but his wife, children, ſervants, or others of their family, taking their rights of the church at *Eaſter*, ſhall pay two-pence for their four offering days yearly.

Provided always, and it is decreed, That if any houſe or houſes which hath been, or hereafter ſhall be letten for ten ſhillings rent by the year or more, be, or hath at any time within eight years laſt paſt, or hereafter ſhall be divided and leaſed into ſmall parcels or members, yielding leſs rent than ten ſhillings by year, and then the owner or owners, if he or they dwell in any part of ſuch houſe, or elſe the principal leſſee and leſſees, if the owner or owners do not dwell

in ſome part of the ſame, ſhall from henceforth pay for his or their Tithes, after ſuch rate of rent, as the ſame houſe was accuſtomed to be letten for before ſuch diviſion, or dividing into parts or members, and the under farmer or farmers, leſſee and leſſees, to be diſcharged of all Tithes for ſuch ſmall parcels, parts or members, rented at leſs yearly rent than ten ſhillings by year, without fraud or covin, paying two-pence a piece yearly for four offering days.

Provided always, and it is decreed, That for ſuch gardens as appertain not to any manſion houſe, and which any perſon or perſons, holdeth or ſhall hold in his or their hands for pleaſure, or to his own uſe, that the then perſon ſo holding the ſame ſhall pay no Tithes for the ſame; but if any perſon or perſons, which holdeth or ſhall hold any ſuch garden, containing half an acre or more, doth or ſhall make any yearly profit thereof, by way of ſale, that then he or they ſhall pay Tithes for the ſame after ſuch rate of his rent, as is herein firſt above ſpecified.

Provided alſo, That if any ſuch gardens not being of the quantity of half an acre or more, be hereafter by fraud or covin di-

vided

vided into leſs quantity or quantities, then to pay Tithes according to the rate above-ſaid.

Provided always, That this decree ſhall not extend to the houſes of great men, or noblemen or noblewomen, kept in their own hands, and not letten for any rent, which in time paſt hath paid no Tithes, ſo long as they ſhall continue ſo unletten; nor to the halls of crafts or companies, ſo long as they ſhall be kept unletten, ſo that the ſame halls in times paſt have not uſed to pay any Tithes.

Provided always, and it is decreed, That this preſent order and decree ſhall not in any wiſe extend to bind or charge any ſheds, ſtables, cellars, timber yards nor teinter yards, which never were parcel of any dwelling houſe, nor appertaining or belonging to any dwelling houſe, nor have accuſtomed to pay any Tithes, but that the ſaid citizens and inhabitants ſhall thereof be quit of payment of any Tithes, as it hath been uſed and accuſtomed.

Provided alſo, and it is decreed, That where leſs ſum than ſixteen pence halfpenny in the ten ſhillings rent, or leſs ſum than the two ſhillings and nine-pence in the twenty ſhillings rent, hath been accuſtomed to be paid

for Tithes, that then in ſuch places the ſaid citizens and inhabitants ſhall pay but only after ſuch rate as hath been accuſtomed.

Item, it is alſo decreed, That if any variance, controverſy, or ſtrife, do or ſhall hereafter ariſe in the ſaid city for non-payment of any Tithes; or if any variance or doubt ariſe upon the true knowledge or diviſion of any rent or Tithes, within the liberties of the ſaid city, or of any extent or aſſeſſment thereof; or if any doubt ariſe upon any other thing entertained within this decree, that then, upon complaint made by the party grieved to the Mayor of the city of *London* for the time being, the ſaid mayor, by the advice of counſel, ſhall call the ſaid parties before him, and make a final end of the ſame, with coſts to be awarded at the diſcretion of the mayor and his aſſiſtants, according to the intent and purport of this preſent decree.

And if the ſaid mayor make not an end thereof within two months after complaint to him made, or if any of the ſaid parties find themſelves aggrieved, that then the Lord Chancellor of *England* for the time being, upon complaint to him made within three months then next following, ſhall make an end in the ſame, with ſuch coſts to be

be awarded as ſhall be thought convenient, according to the intent and purport of the ſaid decree.

Provided always, That if any perſon or perſons take any tenement for a leſs rent than it was accuſtomed to be letten for by reaſon of great ruin or decay, burning, or ſuch like occaſions, or misfortunes, that then ſuch perſon or perſons, his executors, or aſſigns, ſhall pay Tithes only, after the rate of the rent reſerved in his or their leaſe, and none otherwiſe, as long as the ſame leaſe ſhall endure.

Mich. 5 *Jac. C. B. Skidmore* and another, v. *Bell*, parſon of Saint *Michal*, *Queenhithe*, in *London*; the caſe upon the ſaid ſtatute of 37. *H.* 8. and the decree thereupon was this; the ſaid parſon libelled before the Chancellor of *London*, for the Tithes of an houſe, called the *Boar's Head*, in *Bread-ſtreet*, in the ſaid pariſh, by force of the ſaid act and decree, the ancient farm rent whereof was five pounds, at the time of the ſaid decree, and after, and that of late a new leaſe was made of the ſaid houſe rendring the rent of five pounds per annum, and over that a great income or fine, which was covenanted and agreed to be paid yearly at the ſame day; that the rent was paid as a 2 Inſt. 659.

ſum in groſs, and that ſo much rent might have been reſerved for the ſaid houſe, as the rent reſerved and the ſum in groſs amounted unto; which reſervation and covenant, *&c.* were made to defraud the ſaid parſon of the tithes of the true rent of the ſaid houſe, which to him did appertain by the purport and true intention of the ſaid decree.

And in this caſe four points were reſolved by the court.

Firſt. If ſo much rent be reſerved as was accuſtomed to be paid at the making of the ſaid decree, in 37. *H.* 8. (whatſoever fine or income be paid) that the parſon can aver no covin; for the words of the decree be: "Where any leaſe is or ſhall be made of "any dwelling houſe, *&c.* by fraud or co- "vin in reſerving leſs rent than hath been "accuſtomed, or is paid, *&c.*" ſo as if the accuſtomed rent be reſerved, no fraud can be alledged; for the fraud by the decree is, when leſſer rent than was then accuſtomed to be paid is reſerved; or if no rent at all be reſerved, *&c.* for then Tithe ſhall be paid according to the rent that then was laſt before reſerved to be paid. The words of the decree are; "Or that any leaſe ſhall be "made without any rent reſerved upon the "ſame by reaſon of any fine or income, then

" then the farmer ſhall pay for his Tithes " after the rate aforeſaid, according to the " quantity of ſuch rent, as the houſe was " laſt letten for, without fraud or covin, " before the making of ſuch leaſe."

So as the decree conſiſteth upon four points, *viz.*

Firſt, Where the accuſtomed rents, *&c.* was reſerved.

Secondly, Where the rent was increaſed, there the Tithes ſhould be paid according to the whole rent.

Thirdly, Where leſſer rent was reſerved.

Fourthly, Where no rent was reſerved, but had formerly been reſerved.

And this act and decree were very beneficial to the clergy in reſpect of that which they had before: And the defendant in his libel confeſſeth that the accuſtomed rent, *&c.* was reſerved, and therefore no cauſe of ſuit.

Secondly, It was reſolved that ſuch houſes as were never letten to farm, but inhabited

by the owner, is *caſus omiſſus*, and ſhall pay no Tithes by force of the decree.

Thirdly, It was reſolved, that where the decree ſaith, where no rent is reſerved by reaſon of any fine or income paid beforehand; albeit no fine or income be paid, yet if no rent be reſerved, the parſon ſhall have his Tithes according to the decree; for that it is put but for an example, or cauſe, why no rent is reſerved, and whether any fine or income were paid or no, is not material as to the parſon.

Fourthly, It was reſolved, that the parſon could not ſue for the ſaid Tithes in the eccleſiaſtical court, for that the act and decree, that raiſed and gave theſe kind of Tithes, did limit and appoint how, and before whom the ſame ſhould be ſued forth, *viz.* That if a controverſy were moved in the city for non-payment of theſe Tithes, or concerning the true rent or Tithes, that then upon complaint made by the party grieved to the Lord Mayor of *London*, he by advice of his aſſiſtants ſhould make a final end, with coſts to be awarded by his diſcretion. And if the mayor doth not make an end of it within two months, or if any of the parties find themſelves grieved, that then the lord chancellor within three

months

months ſhall make an end thereof with coſts, according to the true intention of the ſaid decree; therefore as the decree gave a new and ſpecial kind of Tithings; ſo it did appoint new and ſpecial judges to hear and determine the ſame. And in the end it was awarded, that the prohibition ſhould ſtand.

In the caſe of Dr. *Meadhouſe* v Dr. *Taylor*, it was reſolved that ſuits for Tithes upon this decree ſhould be before the mayor in writing and not by parol. Noy. 139.

That a reſervation by a leſſor for life upon a leaſe made by him, for years, ſhall not bind him in reverſion to pay Tithes according to that rate.

That a rent for half a year, and after for another half year, is for a year within this decree.

It hath been reſolved, that abbey lands within the city of *London* and the liberties thereof, are not freed from the payment of Tithes within the ſtatute of 31. *H.* 8. becauſe the ſtatute and decree for the payment of Tithes within the city and liberties of *London* was made after the ſtat. 31. *H.* 8. and their privileges are not reſerved. Cro. E. 276. Moor. 912.

In

In the caſe of *Bennett*, D. D. vicar of Saint *Giles*'s *Cripplegate*, *London*, v. *Treppaſs* and others, pariſhioners of the ſaid pariſh. The plaintiff became vicar of the ſaid pariſh in *April* 1717, and in *Trinity Term* 1719, he exhibited his bill in the court of exchequer, againſt the defendants as occupiers of houſes within the ſaid pariſh for Tithes in *London*, after the rate of two ſhillings and nine-pence in the pound, according to the yearly rent of their houſes, and his demand was grounded upon the *ſtatute* 37. *H*, 8. and decree.

Bumb. 106. 143. 2 Br. parl. Ca. 437.

The defendants admitted that they had reſpectively occupied houſes in the ſaid pariſh, *viz.* the defendant *Treppaſs*, an houſe of the yearly value of twelve pounds, the defendant *Brockett*, an houſe of the yearly value of ſixteen pounds, and the defendant *Witchell*, two houſes of the yearly value of ſixteen pounds.

But they inſiſted that no ſuch demand was made as two ſhillings and nine-pence in the pound, by any former vicar of the pariſh; nor was the ſame ever heard of till the plaintiff became vicar, which was but two years before the commencement of the ſuit, and they further inſiſted that they were exempt from ſuch payment of two ſhillings

lings and nine-pence in the pound, by virtue of a *proviſo* in the ſaid ſtatute and decree, whereby it was provided and decreed;

"That where a leſs ſum than after the "rate of two ſhillings and nine-pence in "the twenty ſhillings rent hath been accuſ-"tomed to be paid for Tithes, that then in "ſuch places the citizens and inhabitants "ſhall pay only after ſuch rate as has been "accuſtomed."

The caſe as ſettled (from the evidence) by the counſel concerned for both parties under the direction of the court, was as follows, *viz.*

That there was no proof in the cauſe whether the houſes in queſtion or any of them were, or either of them was, in the leaſe at the time of making the ſaid act, or not, that till the time of the preſent vicar, no ſuch demand was ever heard of as two ſhillings and nine-pence in the pound for Tithes within the ſaid pariſh. That in two ancient Tithe books there appeared to be charged for Tithes againſt the then occupiers of *Treppaſs*'s houſe, the ſeveral ſums of five ſhillings, and three ſhillings and four-pence, and two ſhillings and ſix-pence; which laſt mentioned ſums of three ſhillings and four-pence, and two ſhillings and ſix-pence were proved to be the collector's hand writing;

writing; and that no certain ſum annually, or *modus*, in relation to *Treppaſs*'s houſe, was proved to have been paid but as aforeſaid. That in another Tithe book, commencing in the year 1708, and ending in the year 1713, *Bocket*'s houſe was charged one ſhilling and ſixpence, and *Witchell*'s houſe one ſhilling each quarterly. That one *Surety*'s proved, that he lived for nine years in *Treppaſs*'s houſe, and during that time never paid more to the vicar than ten ſhillings a year, two ſhillings and ſixpence a quarter; therefore the queſtion on the ſaid caſe was, whether two ſhillings and nine-pence in the pound of the yearly rents of the ſaid defendant's reſpective houſes was due for Tithes, by virtue of the ſaid ſtatute and decree of 37. *H.* 8. or not?

It was reſolved by the opinion of the three judges, that the caſe upon this ſtatute was not like a *modus*; for the decree in the ſtatute is, "that all houſes within the "city of *London* and liberties, ſhall pay two "ſhillings and nine pence for every twenty "ſhillings rent;" and then comes the proviſion in *ſection* 18. Now they ſaid it was plain by the ſtatute itſelf, and by *Lindwood*, that in many places in the city there had been a cuſtom to pay Tithes according to the pound rate; and theſe the ſtatute never

p. 201.

never intended to alter or enlarge, but to eſtabliſh; for the ſtatute was not deſigned in deſtruction of any ſettled right; nay, they took it farther, that if there had been a payment of leſs ſums by agreement between the parſon and pariſhioners, they were confirmed by the ſtatute; becauſe it was the deſign of the ſtatute to ſettle ſuch cuſtomary payments, and it was their deſign that they ſhould not be unravelled on either ſide; and accordingly ſuch cuſtomary payments and agreements have been complied with ever ſince the ſtatute. And that leſs ſums have been paid by almoſt every pariſhioner to the parſon, and therewith they have been content; and although ſeveral decrees have been made in this court for payment of two ſhillings and nine pence in the pound, yet no cuſtomary payments in any pariſh have been ſet aſide or broke through; but theſe matters have been compounded between the parties.—They ſaid that *ſection* 18. was a perfect exemption of all thoſe that had paid leſs ſums out of the decree, and therefore this could not be urged as a *modus*, or ſet up in bar of Tithes; for Tithes were originally due, and therefore the bar muſt be complete; but there are no Tithes of houſes due of common right, for they are none of thoſe things that *renovant in anno*. The difference

difference of the payments in the books may be reconciled by ſuppoſing ſome of them to be quarterly, ſome half yearly payments. This caſe relates to the inheritance, and the inheritance is to be bound by our decree; and where the inheritance is charged merely by cuſtom, it is uſual and juſt, if the parties deſire it, to try ſuch cuſtom at law. The court ordered an iſſue to try the validity of theſe payments.

From this decretal order the plaintiff appealed to the houſe of lords, inſiſting that no iſſue whatever ought to have been directed, becauſe there could be no occaſion to ſend thoſe facts to a jury, which had already been ſettled and agreed to by the conſent of both parties.

After hearing counſel on this appeal, it was ordered and adjudged that the ſame ſhould be juſtly diſmiſſed, and the decretal order therein complained of was juſtly affirmed.

Note, in this caſe were cited 2 *Inſt.* 660. *Noy.* 130. *Hard.* 116. *Watſ.* 387. *Cro. Car.* 596. *Yelv.* 31. *Moor.* 912. 1 *Co.* 15.

Grant's

Grant's caſe, *Littl. Rep.* 102, 141. *Deg.* 351. *Hob.* 11. *Dunn*'s caſe, *Calthr. Rep.* 62.

From the laſt recited caſe it clearly appears that the court of exchequer has juriſdiction under the regulation eſtabliſhed by the ſaid ſtatute and decree of 37. *H.* 8. becauſe the act had no negative words in it. 2 Inſt. 445.

Upon the occaſion of the fire of *London*, in 1666, with reſpect to the churches thereby conſumed, another ſtatute was made to make the maintenance of the miniſters to ſuch churches more certain.

The act of 22 and 23. *Car.* 2. *c.* 15. entitled " an act for the better ſettlement of the maintenance of the parſons, vicars, and curates in the pariſhes of *London* burnt by the late dreadful fire there:

" Whereas the Tithes in the city of " *London* were levied and paid with great " inequality, and are ſince the late dread- " ful fire there, in the rebuilding of the " ſame, by taking away ſome houſes, alter- " ing the foundations of many, and the " new erecting of others ſo diſordered, " that in caſe they ſhould not for the time " to come be reduced to a certainty, many

" controverſies

" controverſies and ſuits at law might " thence ariſe, be it enacted by the king's " moſt excellent majeſty, by and with the " advice and conſent of the lords ſpiritual " and temporal, and the commons in this " preſent parliament aſſembled, by the " authority of the ſame, that the annual " certain Tithes of all and every pariſh " and pariſhes within the ſaid city of *Lon-* " *don*, and the liberties thereof, whoſe " churches have been demoliſhed, or in " part conſumed by the late fire; and " which ſaid pariſhes, by virtue of an act " of this preſent parliament, entitled " an " act for the rebuilding of the city of " *London*, uniting of pariſhes, *&c.*" re- " main and continue ſingle as they were " heretofore, or are by the ſaid act annex- " ed or united into one pariſh reſpectively, " ſhall be as followeth: that is to ſay, " the annual certain Tithes, or ſum of " money in lieu of the Tithes of the " pariſh

	£.	s.
Of *Allhallows, Lombard-ſtreet*, -	110	0
St. Bartholomew, Exchange, -	100	0
Bridget, alias St. Bride's, -	120	0
Bennett, Finck, - -	100	0
Michael, Crooked-lane, -	100	0
Chriſtopher, -	120	0

St. Diony's

	£.	s.
Of *St. Dionis, Back-church,*	120	0
Dunſtan in the Eaſt,	200	0
James, Garlick Hythe,	100	0
Michael, Cornhill,	140	0
Michael, Baſſiſhaw,	132	11
Margaret, Lothbury,	100	0
Mary, Aldermanbury,	150	0
Martin, Ludgate,	160	0
Peter, Cornhill,	110	0
Stephen, Coleman-ſtreet,	110	0
Sepulchre,	200	0
Allhallows, Bread-ſtreet, and St. John the Evangeliſt	140	0
Allhallows the Great, and Allhallows the Leſs	200	0
Alban, Wood-ſtreet, and *St. Olave's, Silver-ſtreet,*	170	0
Anne and *Agnes,* and *Saint John Zachary,*	140	0
Auguſtine and *St. Faith,*	172	0
Andrew Wardrobe and *Saint Anne, Blackfriars,*	140	0
Antholin and *Saint John the Baptiſt,*	120	0
Bennett, Gracechurch-ſtreet, and *St. Leonard, Eaſtcheap,*	140	0
Bennet's, Paul's Wharf, and *St. Peter's, Paul's Wharf,*	100	0
Chriſt Church and *St. Leonard's, Foſter-lane,*	200	0

	£.	s.
Of *St. Edmond the King* and *Saint Nicholas Acons*, -	180	0
George, Botolph-lane, and *St. Botolph, Billingsgate*, -	180	0
Lawrence, Jury, and *Saint Magdalen, Milk-street*,	120	0
Magnus and *St. Margaret, New Fish-street*, -	170	0
Michael Royal and *St. Martin Vintry*, -	140	0
Matthew, Friday-street, and *St. Peter, Cheap*, -	150	0
Margaret Pattens, and *Saint Gabriel, Fenchurch*, -	120	
Mary at Hill and *St. Andrew Hubbard*, - -	200	0
Mary Woolnoth and *St. Mary Woolchurch*, - -	160	0
Clement, Eastcheap, and *Saint Martin Orgars*, - -	140	0
Mary Abchurch and *St. Laurence Pountney*, - -	120	0
Mary Aldermary and *Saint Thomas Apostle*, - -	150	0
Mary le Bow, St. Pancras, Soper-lane, and *Allhallows, Honey-lane*, - -	200	0
Mildred, Poultry, and *Saint Mary Colechurch*, - -	170	0
Michael, Wood-street, and *St. Mary Staining*, - -	100	0

	£.	s.
Of *St. Mildred, Bread-ſtreet*, and *St. Margaret Moſes*,	130	0
Michael, Queenhithe, and *Trinity*,	160	0
Magdalen, Old Fiſh-ſtreet, and *St. Gregory*,	120	0
Mary Somerſet and *St. Mary Mowthaw*,	110	0
Nicholas Cole-abby and *Saint Nicholas Olave's*,	130	0
Olave, Jewry, and *St. Martin, Ironmonger-lane*,	120	0
Stephen, Walbrook, and *Saint Stephen Sheerhog*	100	0
Swithen and *St. Mary Bothaw*,	140	0
Vedaſt, alias Foſter's, and *St. Michael Quern*,	160	0

" Which reſpective ſums of money to be " paid in lieu of Tithes within the ſaid " reſpective pariſhes, and aſſeſſed as here- " inafter is directed, ſhall be, and continue " to be, eſteemed, deemed, and taken to " all intents and purpoſes to be the re- " ſpective certain annual maintenance (over " and above glebes and perquiſites, gifts " and bequeſts to the reſpective parſon, " vicar, and curate of any pariſh for the " time being, or to his or their reſpective " ſucceſſors, or to other perſons for his or

" their uſe) of the ſaid reſpective parſons, " vicars, and curates, who ſhall be legally " inſtituted and inducted, and admitted " into the reſpective pariſhes aforeſaid.

" And that the ſaid ſeveral ſums of " money for Tithes may be more equally " aſſeſſed upon the ſeveral houſes, build- " ings, and all other hereditaments what- " ſoever within the ſaid reſpective pariſhes, " be it enacted by the authority aforeſaid, " that the aldermen of ſuch reſpective ward " or wards within the ſaid city, wherein " any of the ſaid pariſhes reſpectively lie; " and his or their deputy or deputies, and " the common councilmen of ſuch reſpec- " tive ward or wards, with the church- " wardens and one or more of the pariſh- " ioners of ſuch reſpective pariſh wherein " the maintenance aforeſaid is reſpectively " to be aſſeſſed, to be nominated by ſuch " reſpective alderman, deputy, common- " councilmen, and churchwardens, or any " five of them, whereof the alderman or " his deputy to be one, ſhall at ſome con- " venient and ſeaſonable time before the " 20th day of *May*, 1671, meet together in " their reſpective pariſhes, and they ſhall " proportionably aſſeſs upon all houſes, " ſhops, warehouſes, and cellars, wharfs, " quays, cranes, waterhouſes (which water-

" houſes

" houſes ſhall pay in the reſpective pariſhes " where they ſtand, and not elſewhere) and " tofts of ground (remaining unbuilt) and " all other hereditaments whatſoever (ex- " cept parſonage and vicarage houſes) the " whole reſpective ſums of this act ap- " pointed, or ſo much of it as is more " than what each impropriator is by this " act reſpectively enjoined to allow, in the " moſt equal way that the ſaid aſſeſſors " according to the beſt of their judgments " can make it, which ſaid aſſeſſments ſhall " be made and finiſhed before the 24th " day of *July* next enſuing.

" That the ſaid aſſeſſors within ten days " after ſuch aſſeſſment made, and the re- " ſpective appeals (if any be) determined, " ſhall make three tranſcripts thereof in " parchment, containing the reſpective " ſums to be payable, or appointed to be " paid out of all and every the ſaid pre- " miſes within ſuch reſpective pariſh, and " ſubſcribe the ſame under their hands, and " within twenty days after ſuch ſubſcrip- " tion as aforeſaid, one of the ſaid tran- " ſcripts ſhall be returned to the lord " mayor of the city of *London*, to be kept " and preſerved by the ſaid lord mayor in " and among the records of the ſaid city; " and another of the ſaid tranſcripts ſhall

" be returned into the regiſtry of the Lord " Biſhop of *London*, and the other of the " ſaid tranſcripts ſhall remain and be kept " in the veſtry of ſuch reſpective pariſh for " a perpetual memorial as is aforeſaid.

" The ſums aſſeſſed to be paid on the " feaſt days of the *Annunciation of the Bleſſed* " *Virgin*, the nativity of Saint *John the Bap-* " *tiſt*, the feaſt of Saint *Michael the Arch-* " *angel*, and the nativity of *Our Bleſſed Sa-* " *viour*, or within fourteen days after each " of the feaſts aforeſaid, by equal pay- " ments, to commence from ſuch time as " the incumbent ſhall begin to officiate.

" Impropriators ſhall pay what *bona fide* " they have uſed to pay at any time to the " reſpective incumbent before the late fire; " the ſame to be computed as part of the " maintenance of ſuch incumbent.

" And if any inhabitant refuſe or neglect " to pay to the incumbent the ſum ap- " pointed by him to be paid (the ſame be- " ing lawfully demanded upon the pre- " miſes); it ſhall be lawful for the lord " mayor, upon oath to be made before " him of ſuch refuſal or neglect, to grant " out warrants for the officer or perſon ap- " pointed to collect the ſame, with the

" aſſiſt-

" aſſiſtance of a conſtable in the day time,
" to levy the ſame by diſtreſs and ſale of
" the goods of the party ſo refuſing or
" neglecting; reſtoring to the owner the
" overplus over and above the ſaid arrears,
" and the reaſonable charges of making
" ſuch diſtreſs.

" If the lord mayor refuſe or neglect to
" execute any of the powers given him by
" this act, the lord chancellor or lord
" keeper, or two or more of the barons of
" the exchequer, by warrant under their
" hands and ſeals reſpectively, to do and
" perform what the ſaid lord mayor might
" or ought to have done in the premiſes.

" *Provided always*, That no court or
" judge eccleſiaſtical or temporal, ſhall hold
" plea of, or for any the ſum or ſums of
" money due, and owing, or to be paid
" by virtue of this act, or any part thereof,
" other than the perſons hereby authorized
" to have cognizance thereof: Nor ſhall
" it be lawful, to or for any parſon, vicar,
" curate or incumbent, to convent or ſue
" any perſon or perſons aſſeſſed, as afore-
" ſaid, and refuſing or neglecting to pay
" the ſame in any court or courts, or be-
" fore any judge or judges, other than what

" are authoriſed and appointed by this act " for the hearing and determining of the " ſame, in manner aforeſaid."

And there is a *proviſo* for the warden and minor canons of Saint *Paul*, parſon and proprietors of the rectory of the pariſh of Saint *Gregory* aforeſaid, to receive and enjoy all Tithes, oblations and duties, ariſing or growing due within the ſaid pariſh, in as large, ample and beneficial manner, as formerly they have, or lawfully might have done.

By 9 *Ann*, *c.* 22. *ſ.* 2. The money ariſing by the duty on coals imported into the *Thames*, of two ſhillings per chaldron from 14th *May* 1716, and three ſhillings till 28th *September* 1724, is to be paid into the *Exchequer*, and appropriated to the building of fifty new churches, of ſtone and other materials, with towers or ſteeples to each, and for purchaſing ſites of churches and churchyards, and burying places in or near *London* and *Weſtminſter*; and for making ſuch chapels as are capable thereof, pariſh churches, and for purchaſing houſes for miniſters, and for applying four thouſand pounds *per annum* out of the ſaid duties, towards repairing the collegiate church of Saint *Peter*, *Weſt-*

Weſtminſter, and ſix thouſand pounds *per annum* towards the finiſhing of *Greenwich Hoſpital*.

Ex parte Savage, rector of the united pariſhes of Saint *Andrew Wardrobe*, and Saint *Anne*, *Blackfriars*, and *ex parte Wood*, rector of Saint *Michael Royal*, and Saint *Martin Vintry*. 3 Atk. 639.

Which came before Lord *Harcourt* (lord chancellor) on petition ſetting forth, that the petitioners had reſpectively demanded of the inhabitants the reſpective rates and arrears for the houſes in their reſpective occupations, but they refuſed to pay the ſame. And that the petitioners applied to Sir *Richard Hoare*, lord mayor, for ſuch warrants as the act of parliament directed him to grant for levying the ſaid money, and he refuſed to grant ſuch warrants; wherefore it was prayed that his lordſhip would grant the petitioner his warrant to levy the ſeveral ſums of money ſo reſpectively due to them, by diſtreſs and ſale of the goods of the defaulters.

Lord *Harcourt* thinking the matter of great conſequence to the *London* clergy in general, as no ſuch complaint, ſince the making of the act, had been before made to the

the lord chancellor, or lord keeper of the great ſeal, or to any two of the barons of the *Exchequer*, deſired the aſſiſtance of Mr. Baron *Bury* and Mr. Baron *Price*, and it came on again in their preſence.

When it appeared that ſeveral of the quarterly ſums claimed by the petitioners became due and in arrear when the houſes ſtood empty, or were in the poſſeſſion of former tenants or occupiers thereof; and a queſtion thereupon ariſing, whether ſuch ſums ſo aſſeſſed upon the ſeveral houſes, for making up certain annual ſums of money to be paid in lieu of Tithes, were become a fixed or real charge upon the houſes, whereon they had been ſo aſſeſſed, ſo that the arrears which became due in the time of former tenants, or when the houſes were empty, might be levied on the ſucceeding tenants.

The two barons certified their opinion, that by the ſtatute the ſums aſſeſſed on the ſeveral houſes are become real charges upon the houſes, ſo that the arrears which ought to have been paid by the former occupiers, or which became due when the houſes ſtood empty, may be levied by diſtreſs and ſale of the goods of the preſent occupiers: And Lord *Harcourt* declared he entirely concurred in opinion with the two barons, and that

that the petitioners were at liberty to apply to him for warrants of diſtreſs as prayed by their petitions.

And in the caſe *ex parte Croxall*, miniſter of the united pariſhes of Saint *Mary Somerſet* and Saint *Mary Mountſhaw*, the lord mayor had heard the parties and was of opinion not to grant the warrant, and thereupon it was urged that the lord mayor's determination was final, and nothing further could be done. 3 Atk. 639.

Lord *Hardwicke* (lord chancellor) ſaid that the lord mayor's determination is final only in caſes of appeal brought before him, but here the only act he has to do is to iſſue out his warrant, which having refuſed to do, the lord chancellor held that he had juriſdiction to enquire whether the lord mayor had done right in refuſing his warrant, and if he is of opinion that the lord mayor had done wrong, he could then iſſue his own warrant for levying the aſſeſſment.

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Page.	Line.	
27		in margin, for 7th. read 8th.
38		26 for ringue read lingue.
59		9 for cudua read cudua.
106		20 for regulatine read regular.
138		23 for land read kind.
239		22 for land read kind
243		13 for [illegible] read [illegible]
269		[illegible]
290		[illegible]
293		[illegible]
345		2 [illegible] read Tiber.
363		27 for a mulus read mulus
340		1 for VII. read VIII.
369		1 for thers read there not.
373		15 for 4. read IV. 8.
415		38 for tudre Legden read turpi Lucan.
419		margin, for Ver. Rep. read 3 Ver. Rep.
502		25 for fed read fed non.

The Reader's Attention is requeſted to the following Corrections.

Page.	Line.	
17		in margin, for *Ath.* read *Atk.*
28	26	for *cinquæ* read *linguæ.*
59	9	for *cadua* read *cædua.*
106	20	for *regulation* read *regiſter.*
138	23	for *land* read *kind.*
139	22	for *hand* read *kind.*
143	13	for *houſes* read *horſes.*
169	13	for 12 read 2.
190	17	for 61 read 6.
193	14	for *exiſtiunt* read *exiſtunt.*
245	2	for *Tihes* read *Tithes.*
263	27	for *ambubus* read *ambabus.*
340	1	for VII. read VIII.
369	1	for *were* read *were not.*
373	16	for *H.* read *H.* 8.
415	18	for *tuire London* read *turri London.*
479		margin, for *Ter. Rep.* read 1 *Ter. Rep.*
502	26	for *ſed* read *ſed non.*

